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### Inventing the Classical Constitution

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# Inventing the Classical Constitution

Herbert Hovenkamp\*

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## I. INTRODUCTION

Libertarian and some conservative writers have pined for return to a “classical” understanding of U.S. constitutions, particularly the Federal Constitution.<sup>1</sup> “Classical” does not necessarily mean “originalist” or strictly

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1. E.g., DAVID N. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* (2011); THOMAS R. POPE, *SOCIAL CONTRACT THEORY IN AMERICAN JURISPRUDENCE: TOO MUCH LIBERTY AND TOO MUCH AUTHORITY* (2013); TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* (2014); Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein’s The Classical Liberal Constitution*, 8 N.Y.U. J.L. & LIBERTY 839 (2014); Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055 (2014); Ilya Somin, *Libertarianism and Originalism in The Classical Liberal Constitution*, 8 N.Y.U. J.L. & LIBERTY 1045 (2014); Richard E. Wagner, *Richard Epstein’s The Classical Liberal Constitution: A Public Choice Refraction*, 8 N.Y.U.

textualist. Some classical views, such as the attempt to revitalize *Lochner*-style economic due process,<sup>2</sup> find little support in the isolated text of the Federal Constitution or any of the contemporary state constitutions. Rather, constitutional meaning is thought to lie in a background link between constitution formation and classical statecraft. While the text is important, classical liberalism becomes the essential framework through which the Constitution is interpreted.<sup>3</sup> That might make sense if classical liberalism were the framework within which the Constitution was written, but it was not.

The classical Constitution is sometimes said to rest on a constructed social contract to which everyone in some initial position agreed. As is true of any contract, it would make every participant a winner.<sup>4</sup> The participants have “rights of liberty and property antecedent to the state,” but choose to give up as little of these as needed to empower government.<sup>5</sup> Because insisting on either unanimous consent or individual voter participation on every issue is impractical and unwise, republican representative government comes into existence. But then it is essential that this government act consistently with the social contract and not be captured by special interests. This classical theory applies to both “macro” concerns, such as state policy toward economic development or welfare, and also to “micro” concerns, including liberty of private contract, strong rights in both conventional and intellectual property, and the right to engage in business with no more than the essential minimum of State oversight. Finally, it tends toward libertarianism on questions of noneconomic individual rights, as long as their exercise does not harm others excessively.<sup>6</sup>

The foundational sources claimed for the classical Constitution include: Locke’s writings on government; the political thought of Hobbes, Hume, and Montesquieu; the *Federalist*, in particular James Madison’s *Federalist No. 10*; and the *Anti-Federalist*.<sup>7</sup> Important collateral influences include Blackstone’s

J.L. & LIBERTY 961 (2014). For an older work, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

2. See, e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011). See generally *Lochner v. New York*, 198 U.S. 45 (1905).

3. See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 45–71 (2014); see also *id.* at 53 (“In its enduring provisions, our Constitution is most emphatically a classical liberal document.”).

4. *Id.* at 20 (“The grand social contract . . . at every stage . . . is meant to produce the same win/win outcomes, just like ordinary contracts . . .”).

5. *Id.* at 7.

6. See HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970*, at 243–62 (2015).

7. See, e.g., EPSTEIN, *supra* note 3, at 3 (referring to the works of Hobbes, Locke, Montesquieu, and Hume); see also CHARLES DE MONTESQUIEU, *THE SPIRIT OF LAWS* (1748); *THE FEDERALIST NO. 10* (James Madison, Nov. 22, 1787); THOMAS HOBBS, *LEVIATHAN* (1651); DAVID HUME, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 465 (Eugene F. Miller ed., Liberty Fund rev. ed. 1987); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

conception of the centrality of the common law,<sup>8</sup> as well as Adam Smith's views about the importance of the free market over government interference.<sup>9</sup> Markets have an esteemed place in the classical Constitution. They come closer than any institution to realizing the social contract's ideal, namely, the movement of resources only by the consent of all affected parties.

The resulting constitutionalism is wary of legislation as excessively vulnerable to special-interest capture, suspicious of non-unanimous direct democracy tools, such as initiatives and referenda, because of their propensity to disrespect individual rights,<sup>10</sup> and severely critical of most forms of economic regulation, including protective labor legislation. With this distrust of legislation comes a reliance on judges to get the right answer by applying classical liberal principles, striking down statutes as unconstitutional even when the court's mandate is not explicitly stated in any constitutional language.

Today the most common foil for classical liberal constitutionalism is the "progressive" constitution. For example, Richard Epstein writes of a "Progressive Response" that vanquished a classical liberal constitutionalism that he believes was dominant for roughly 150 years.<sup>11</sup> This progressive synthesis replaced classicism with broad judicial deference to legislatures on matters of economic regulation, typically under rational basis or other comparatively weak tests. Progressive constitutionalism also favors or is at least benign toward state involvement in the redistribution of wealth, guarantees of entitlements, and economic regulation of markets. It tolerates the use of regulatory agencies to extend executive power into areas traditionally within the scope of the Federal Constitution's Article I's legislative power or Article III's judicial power.<sup>12</sup>

In the 1970s, both centrist and more left-leaning legal historians began to argue that "classical legal thought" dominated American legal theory from the mid-1800s to the early 1900s, but gradually gave way to "progressive legal thought."<sup>13</sup> This writing produced a paradigm for thinking about the history

8. See EPSTEIN, *supra* note 3, at 84, 318, 323. See generally WILLIAM BLACKSTONE, COMMENTARIES.

9. See EPSTEIN, *supra* note 3, at 150, 582. See generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannon ed., Methuen & Co. 5th ed. 1904) (1776).

10. EPSTEIN, *supra* note 3, at 25, 137.

11. *Id.* at 34; see also David E. Bernstein, *From Progressivism to Modern Liberalism: Louis D. Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029, 2029 n.1 (2014) (referring to "post-*Lochner*, pre-New Deal opponents of liberty of contract, and other pre-New Deal proponents of government activism, as 'Progressives'").

12. EPSTEIN, *supra* note 3, at 55.

13. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 9-63 (1992); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991). Prior to 1980, a widely circulated unpublished book manuscript by Duncan Kennedy developed the term. It was eventually published as DUNCAN

of elite legal thought in the United States that dominates to this day. It created the impression that “progressives” developed a new approach to legal thought, while conservatives clung to historical classicism. This paradigm has been used both by defenders of progressive legal theory and by those who defend the classical position while decrying the progressive revolution.<sup>14</sup>

While these historians were correct about the relatively late arrival of classical legal thought, in other respects they seriously overstated their case. The developers of the progressive model created a false image of reaction, or of conservatives who resisted legal change by clinging to classical ideology. In fact, conservatives and moderates during the late 19th and early 20th centuries were just as revisionist as the people we style “progressives,” although the conservatives’ and moderates’ revisions often went in different directions.<sup>15</sup>

I write here as a legal historian and (as best I can) take no position on substantive questions of political ideology or constitutional interpretation. With that caveat, this Article argues, first, that the Constitution was not classical in its inception. Rather, the classical Constitution was invented decades later. The historical constitution was “pre-classical,” particularly on matters of private contract and property rights and on government encouragement of economic development. That conclusion is consistent with the Constitution’s text but even clearer from contemporary perspectives and early judicial interpretations. Similar developments occurred in private law, where the anti-monopolistic, *laissez faire* doctrines that characterized 19th-century legal classicism actually came into existence 40 or more years after the Constitution was ratified.<sup>16</sup>

Second, a more distinctively “classical” perspective on the Constitution developed, as the influence of Adam Smith’s *Wealth of Nations* and his English and American followers, filtered through American academies and institutions of government. More classical views grew largely out of the

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KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006). See also SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE (1992); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937 (1998); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725 n.90 (1976); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3 (1980).

14. E.g., EPSTEIN, *supra* note 3, at 55; see also sources cited *supra* note 13.

15. This is an important theme in HOVENKAMP, *supra* note 6. See also Herbert Hovenkamp, *Progressive Legal Thought*, 72 WASH. & LEE L. REV. 653, 654–61 (2015) (disputing the proposition that the principal counter to classical constitutionalism is progressive legal thought).

16. E.g., HORWITZ, *supra* note 13, at 31–62 (discussing property rights); *id.* at 63–74 (discussing just compensation); *id.* at 74–99 (reviewing nuisance, punitive damages and negligence); *id.* at 160–210 (explaining the transition from equitable to *laissez faire* conceptions of contract); *id.* at 211–52 (presenting the concept of negotiability and emergence of commercial law).

Jacksonian movement, which began to take hold in the early 1830s.<sup>17</sup> These views appeared in federal constitutional doctrine with Jackson's 1836 appointment of Chief Justice Roger B. Taney, an economic liberal. Classical liberal views increasingly influenced both state and federal constitutional thought well into the 20th century although state courts interpreting their own constitutions often led the way. The evolving positions included a strong antiregulatory bias favoring private markets, suspicion of monopoly both inside and outside the patent system, legislative-capture justifications for judicial review, a strong view of liberty of contract, and the constitutionalization of the employee-at-will rule, which effectively turned the employment relationship into a species of commercial contract.<sup>18</sup> As these doctrines expanded, however, constitutional doctrine began to depart more significantly from constitutional texts and collateral historical sources.

Jacksonians were interventionist on questions of morals.<sup>19</sup> Indeed, the Jackson and post-Jackson periods are characterized by a significant increase in government regulation of conduct thought to be immoral, compensating for a splintered and more pluralistic Christian Church that was rapidly losing its political hegemony. Considering its record on both economics and morals, the Jacksonian movement cannot be described as libertarian. These views were reflected not only in legislation and judicial decisions, but also in the great constitutional treatise writers of the post-Civil War Era: Thomas M. Cooley, John F. Dillon, Christopher Tiedeman, and Francis Wharton. All of these writers preached a strong version of *laissez faire* in areas of business, and equally strong interventionism in matters of morals, supporting harsh regulation of lotteries, alcohol consumption, and even offenses that had few identifiable victims, such as Sabbath breaking and blasphemy.<sup>20</sup>

In making this argument for a late-arising "classical" interpretation of the Constitution, the discussion here devotes relatively little attention to the rise of the economic substantive due process doctrine, which has been extensively discussed by many historians.<sup>21</sup> While opinions differ about the origins of economic substantive due process, no one (as far as I know) dates it earlier

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17. See generally CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846* (1991).

18. See HOVENKAMP, *supra* note 6, at 268–69.

19. See *id.* at 243–63.

20. *Id.* at 254–56; see also KYLE G. VOLK, *MORAL MINORITIES AND THE MAKING OF AMERICAN DEMOCRACY* 3–5, 37, 58 (2014).

21. E.g., VIII OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 48–49, 82 (1993); see, e.g., PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* (1998); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988) (discussing conventional theories about the development of economic substantive due process and describing the impact of transforming scientific world views on the doctrine); David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217 (2009) (synthesizing recent economic substantive due process scholarship and liberty-of-contract jurisprudence).

than Chief Justice Taney's 1852 decision, *Bloomer v. McQuewan*, a case arising under the federal Patent Act.<sup>22</sup>

After a brief discussion of judicial review and the Commerce Clause prior to the Classical Period, I turn to legal and economic doctrine that has been less well represented in the literature. One instance is the growing hostility of 19th-century classical constitutionalists to Marshall Era Contract Clause jurisprudence, which limited the State's power to modify already executed contracts. Classicists also developed a *laissez faire* "public purpose" doctrine limiting the activities for which public governments could tax and that, to some extent, anticipated economic substantive due process.<sup>23</sup> Another important development was the rise of the "inverse" condemnation doctrine, which required compensation for injuries to private property caused by state-sanctioned economic development when there was no assertion of eminent domain power. The principal legal vehicle for this was amendments to state constitutions that occurred in the 1870s.<sup>24</sup> Yet another, which I have addressed in a different paper, is the emergence of a "classical," largely administrative federal patent law system that took the issuance of patent "monopolies" away from state legislatures, where they were excessively prone to special-interest capture. In the process, however, the patent system was recast as a set of property rights whose definition and scope were largely isolated from concerns about economic development. That economic isolationism has affected patent law ever since.<sup>25</sup>

Third, one element thought by some to be central to classical political theory, the "social contract," never played much of a role in American constitutional development prior to the mid-20th century, not even during the period of the Constitution's formation or the earliest interpretation of *Lochner* or its later heyday. While judges and constitutional writers often spoke of a social "contract" or "compact," they were almost always referring to the text of a state constitution, the United States Constitution, or some other authoritative document. They rarely advocated for a social contract doctrine that would enable them to move beyond the ratified text to some unstated fundamental principle. Attempts to do so were regularly repudiated. Even the academic and judicial architects of economic substantive due process during the Gilded Age and Progressive Era did not typically rely on the social contract idea, and some forcefully rejected it.<sup>26</sup>

Fourth, and finally, the idea that the classical constitutional doctrine was displaced by "progressive" constitutionalism is also wrong, or at least wildly

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22. See *Bloomer v. McQuewan*, 55 U.S. 539, 547–48 (1852); see also Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, ARIZ. L. REV. (forthcoming 2016), <http://ssrn.com/abstract=2625596>.

23. See *infra* Part III.C and accompanying text.

24. See *infra* notes 201–03 and accompanying text.

25. Hovenkamp, *supra* note 22, at 25.

26. See *infra* Part IV.

exaggerated. The constitutional revolution that occurred during the first four decades of the 20th century was certainly supported by self-identified “progressives.” But support for change was actually broader and much more centrist, better described by the term “neoclassical” than “progressive.” “Neoclassical” refers to revolutionary movements in many disciplines “that [are] derivative of an earlier ‘classical’ period,” accepting many of its values and forms but contributing something new, as well.<sup>27</sup> Further, the contributions were revisionist, often reformulating well-established ideas in ways that the classicists themselves would have rejected. For example, neoclassical economics in the late 19th and early 20th century preserved classicism’s faith in markets and even some of its technical doctrine. However, it rejected classicism’s tendency to determine value from past averages, substituting a forward-looking theory of value based on rational expectations. The results were a rejection of classicism’s backward-looking and heavily historicist views, greater sophistication about risk and its management, and a broader conception of market failure.<sup>28</sup> Neoclassical legal thought largely followed the same course, severely qualifying but never rejecting the common law and doing the same thing for traditional property and contract rights. Business policy, while hardly “progressive” overall, became thoroughly neoclassical. By about 1930, most economists were marginalist; only a subset were progressives.

## II. THE HISTORICAL CONSTITUTION

The founding parent of classical economic theory in the Anglo-American tradition is, of course, Adam Smith. His *Wealth of Nations* was published in 1776, on the eve of the American Revolution. After examining the record of the Constitution’s founding, however, the influential mid-20th century historian Clinton Rossiter concluded that “[t]he laissez-faire principles of Adam Smith were no part of the American consensus in 1787,” the year of the Constitutional Convention.<sup>29</sup> A generation later, with a little more qualification, Garry Wills largely agreed.<sup>30</sup>

Rossiter’s categorical statement was an exaggeration. The first American printing of *The Wealth of Nations* was in 1789, but it had been written in English and was widely available in the United States prior to then.<sup>31</sup> Nevertheless, the records of the Constitutional Convention include no references to it. Nor is there any explicit reference to Smith or his book in *The Federalist*. Adam Smith was unpopular among many of the Constitution’s Federalist supporters

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27. HOVENKAMP, *supra* note 6, at 2; *see also id.* at 3–4.

28. *Id.* at 4–7.

29. CLINTON ROSSITER, 1787: THE GRAND CONVENTION 69 (1966).

30. *See* GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 17, 20, 68–69, 202 (1981).

31. *See* William Letwin, *The Economic Policy of the Constitution*, in LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION 121, 131 (Ellen Frankel Paul & Howard Dickman eds., 1989).



because he was British.<sup>32</sup> By contrast, Thomas Jefferson and James Madison both read and admired *The Wealth of Nations*, and there is some evidence that Madison relied on Smith even though Madison never cited him.<sup>33</sup> Other contemporaries knew who Smith was and owned his book, but many, such as Hamilton, particularly in his *Report on Manufactures*, rejected its *laissez faire* theory in favor of one favoring governmental support for economic development.<sup>34</sup>

Smith opposed the use of government inducements to encourage economic development, particularly state-sanctioned monopolies or other privileges granted to corporations.<sup>35</sup> Six state delegations<sup>36</sup> to the Constitutional Convention unsuccessfully urged a provision prohibiting the federal government, although not the states, from making monopoly grants in order to further development. Two years later, James Madison successfully resisted attempts to have such a provision included in the Bill of Rights.<sup>37</sup>

The legal ancestor of this early and unsuccessful anti-monopoly movement was the English Statute of Monopolies, which had been enacted in 1623, long before either John Locke or Adam Smith.<sup>38</sup> The American states were concerned about a centralized federal power to create monopolies that might injure individual states, rather than with state power to create their own monopolies, which would benefit the granting states. Indeed, during the post-ratification period nearly every state enthusiastically issued monopoly grants in its own corporate charters. Massachusetts and New York led the way in state grants of monopoly charters, even though they had opposed federal power to create monopolies.<sup>39</sup> By contrast, an anti-monopoly provision did make its way into the Revolutionary Era North Carolina Constitution, although it was

32. See Edward G. Bourne, *Alexander Hamilton and Adam Smith*, 8 Q.J. ECON. 328, 329 (1894) (arguing that Hamilton's *Report on Manufactures* tracked Smith and paraphrased him but did not cite him because as an English political economist, Smith was unpopular in Hamilton's circles).

33. Samuel Fleischacker believes there were one or two implicit references not mentioning Smith's name. See Samuel Fleischacker, *Adam Smith's Reception Among the American Founders, 1776–1790*, 59 WM. & MARY Q. 897, 903 (2002). Thomas Jefferson's personal copies of *Wealth of Nations* can be viewed at *Wealth of Nations*, MONTICELLO, <http://www.monticello.org/site/research-and-collections/wealth-nations> (last visited Sept. 21, 2015).

34. See Fleischacker, *supra* note 33, at 902 n.6 (citing ALEXANDER HAMILTON, REPORT ON MANUFACTURES (1791)). On Hamilton's differences with Smith, see generally PETER MCNAMARA, POLITICAL ECONOMY AND STATESMANSHIP: SMITH, HAMILTON, AND THE FOUNDATION OF THE COMMERCIAL REPUBLIC (1998).

35. See Fleischacker, *supra* note 33, at 905.

36. The delegations came from New Hampshire, Massachusetts, New York, North Carolina, Virginia, and Rhode Island. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1013 (2013).

37. *Id.* at 1014.

38. See English Statute of Monopolies 1623, 21 Jac. 1, c. 3.

39. See HOVENKAMP, *supra* note 13, at 18–23, 27.

apparently never used to strike down an exclusive grant in a corporate charter.<sup>40</sup>

Two generations later things had changed dramatically. The Jacksonian movement sharply heightened the concern about both state- and federally created monopolies, as well as other special privileges for favored business interests. In fact, hostility toward monopoly in nearly every economic area became a defining characteristic of the emergent Jacksonian movement, with effects that have never entirely dissipated. Indeed, one of Epstein's strong objections to progressive New Deal policy is to its use of regulatory process to protect "favored, entrenched monopolies."<sup>41</sup>

The United States Constitution was written at an important transitional time in the history of western political and economic thought. To the extent the Constitution reflects a theory of economics and government intervention, it came mainly from the predecessors of classical economic thought. What little the Framers' generation derived from Adam Smith was not the central principles about markets and government that we today associate with classical thought. Rather, Smith's influence pertained to more marginal issues such as the wisdom of having a standing army, which Smith favored;<sup>42</sup> "the important distinction between 'direct' and 'indirect' taxation," which occasioned the Supreme Court's first citation of an economic text;<sup>43</sup> the importance of separation of church and state;<sup>44</sup> the profligacy of monarchs;<sup>45</sup> and Smith's preference for farming over manufacturing.<sup>46</sup> Although Madison did not cite Smith, there are some parallels between Madison's views in *Federalist No. 10* concerning the competition among different interest groups ("factions") and Smith's arguments based on competition among various religious sects in England.<sup>47</sup>

American colleges and schools in the early national period developed almost no "indigenous" theory of political economy. The discipline was taught as a branch of moral philosophy, and with British and a few Continental

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40. N.C. CONST. art. XXIII (1776) ("That perpetuities and monopolies are contrary to the genius of a free State and ought not to be allowed."); see also *Minge v. Gilmour*, 17 F. Cas. 440, 444, 446 (C.C.D.C.N.C. 1798) (No. 9631) (relying on this provision to hold that the fee tail estate did not exist in North Carolina). See generally Joshua C. Tate, *Perpetuities and the Genius of a Free State*, 67 VAND. L. REV. 1823 (2014) (observing North Carolina's unique history as proprietary land grant colony that gave rise to perpetuities issues).

41. EPSTEIN, *supra* note 3, at 37.

42. Fleischacker, *supra* note 33, at 904.

43. *Id.* at 905; see also *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 180–81 (1796) (quoting *Wealth of Nations* on the difference between a tax on revenues and a tax on expenses).

44. Fleischacker, *supra* note 33, at 905, 907 (discussing Smith's influence on Madison with regard to the separation of church and state).

45. *Id.*

46. *Id.* at 906.

47. *Id.* at 910.

texts.<sup>48</sup> The economic views that dominated in late 18th-century America favored active government involvement in managing the economy and creating infrastructure. More *laissez faire* beliefs were outliers.

Daniel Raymond, a Federalist and lawyer by training, authored the only comprehensive American treatise on political economy prior to the Jackson era.<sup>49</sup> He defended the monopoly grants:

A nation may be desirous of establishing some useful manufactory, or to open some new source of trade, which is expected to be useful and important to the nation, at some future period; and for the attainment of these objects, it may be expedient to create a private monopoly for a limited period. This monopoly may be granted to a single individual, to a company, to a corporation, or to some particular town; and although the rest of the nation may be excluded from the benefit of it, still as the object is to promote national interests, and as it is the duty of every citizen to forego his own private advantage for the public good, no one will have a right to complain.<sup>50</sup>

Alexander Hamilton also believed that beneficial private investment in many forms of enterprise and technology could be facilitated through the use of monopoly grants or other inducements.<sup>51</sup> By contrast, the anti-Federalists opposed the Constitution in part because they believed that it permitted the federal government to create monopolies.<sup>52</sup> Both Raymond's and Hamilton's positions were consistent with a long colonial history of using subsidies and exclusive grants in order to further economic development.<sup>53</sup>

In his later book, *Elements of Constitutional Law and of Political Economy*, Daniel Raymond flatly rejected as "absurd" the ascendant classical view that state-sanctioned exclusive privileges benefitted the rich at the expense of the

48. See 2 JOSEPH DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION*, 1606–1865, at 512–15 (1946).

49. *Id.* at 566–73.

50. DANIEL RAYMOND, *THOUGHTS ON POLITICAL ECONOMY: IN TWO PARTS* 326 (1820).

51. See HOVENKAMP, *supra* note 13, at 18; Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 7–8 (2008). On the reaction of Jeffersonians to Federalist Era political economy, see generally DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980).

52. See James Winthrop, *Agrippa*, IX, MASS. GAZETTE, Dec. 28, 1787, reprinted in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES: PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE*, 1787–1788, at 80 (Paul Leicester Ford ed., 1892) (James Winthrop is attributed as the author, but authorship has not been conclusively established); see also JOHN DICKINSON, *Two Letters on the Tea Tax*, in I *THE WRITINGS OF JOHN DICKINSON: POLITICAL WRITINGS*, 1764–1774, at 457–60 (Paul Leicester Ford ed., 1895); Robert Yates, *Address by Sydney*, reprinted in 6 *THE COMPLETE ANTI-FEDERALIST* 107, 112 (Herbert J. Storing ed., 1981) (writing under the pseudonym "Sydney"). Yates also used the pseudonym "Brutus."

53. Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* 97–116 (June 2005) (unpublished Ph.D. thesis, Harvard Law School), <http://www.utexas.edu/law/faculty/obracha/dissertation>.

poor.<sup>54</sup> Although monopolies may increase consumer prices, these effects are “more than counterbalanced” by higher wages.<sup>55</sup> In his *Commentaries on the Constitution of the United States*, Justice Story agreed, arguing that exclusive rights in corporate charters for the construction of toll bridges or other works of public improvement were absolutely essential in order to guarantee an adequate return on investment.<sup>56</sup>

American governments have always been involved in economic development and creation of infrastructure, although both the amount and the nature of their involvement changed over time.<sup>57</sup> Overall, southern states tended to be more *laissez faire* than the northeastern seaboard, mainly because of the South’s greater reliance on agriculture and slavery.<sup>58</sup> Most government economic intervention in the 19th century did not involve direct management by government agencies, because these did not yet exist. Infrastructure was typically financed through public grants of land, monopoly provisions, tax exemptions, or other perquisites in exchange for a corporate charter that obligated the corporation to build and operate the contemplated work.<sup>59</sup> For example, the Massachusetts Constitution of 1780 required the Commonwealth to use “rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, [and] manufactures.”<sup>60</sup> Notwithstanding its position during the ratification debates that the federal government should be prohibited from creating monopolies, Massachusetts developed a strong tradition of using monopoly corporate charters in its own grants to encourage economic development.<sup>61</sup> Other states did the same thing.<sup>62</sup>

Some public works required more explicit financial support. In the early national period, lotteries were often used to fund public-works projects.<sup>63</sup>

54. DANIEL RAYMOND, *ELEMENTS OF CONSTITUTIONAL LAW AND OF POLITICAL ECONOMY* 223 (4th ed. 1840).

55. *Id.*

56. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1833).

57. *E.g.*, OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774–1861* (rev. ed. 1969); HOVENKAMP, *supra* note 13, at 17–41; JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836–1915* (1964); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830* (Univ. of Ga. Press 1994) (1975). See also EPSTEIN, *supra* note 3, who acknowledges a role for the State in supporting infrastructure, *id.* at 42–43, but also concludes that the difference between classicists and progressives was their attitude toward state-created monopoly. *Id.* at 36.

58. See 2 DORFMAN, *supra* note 48, at 527–65.

59. HOVENKAMP, *supra* note 13, at 17–41.

60. MASS. CONST., ch. V, § 2 (1780).

61. HANDLIN & HANDLIN, *supra* note 57, at 68–77, 177–79, 212–13.

62. HOVENKAMP, *supra* note 13, at 17–25; WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 1–55 (1996).

63. See HOVENKAMP, *supra* note 6, at 256–59.

During the Jackson era, Christian evangelicals attacked lotteries on moral grounds, and governments turned to more secular revenue sources, such as municipal bonds. The bonds were issued to the public and then used either to purchase corporate stock or to finance outright grants to corporations for construction.<sup>64</sup> Failure rates were very high, creating the impression that bond issuance was nothing more than a boondoggle, largely intended to benefit railroads at the public's expense.<sup>65</sup> In a very real sense, the municipal bond cases, many of which went to the Supreme Court, soured both citizens and government decision makers about public investment, paving the way for economic substantive due process doctrine.<sup>66</sup> But these were mid-century developments, occurring many decades after the Constitution had been ratified.

### III. THE ORIGINS OF THE CLASSICAL CONSTITUTION

Richard Epstein's *The Classical Liberal Constitution* is a masterpiece of constitutional interpretation. Nevertheless, Epstein's book is quite revealing for its discussion of case law and legislation prior to the Jackson Era. Epstein focuses mainly on the Federal Constitution, not those from the states. But, in contradiction to his thesis that the Constitution was classical liberal from its founding, his own book reveals a much later development and very little evidence that either the Framers or early constitutional interpretation supported his positions.

To be sure, already in 1803 Chief Justice Marshall's opinion in *Marbury v. Madison* justified judicial review of federal legislation.<sup>67</sup> This doctrine is to Epstein's liking because the judiciary should have wide berth to overturn statutes that interfere with liberty of contract or other rights in property or person. In the process, however, Epstein reveals just how many edges the sword of judicial review can have: it encompasses John Marshall's style of expansionist reasoned elaboration, the *Lochner* Era which Epstein admires, and of course the expansions of the Warren Court, which he does not. Each of these interpreted the text within an underlying framework about the appropriate role of government, but the frameworks were very different. Chief Justice Marshall himself did not use judicial review to accomplish the purposes Epstein had in mind, but largely in the service of expansive federal power and coordinate limits on state power.<sup>68</sup>

One unifying theme of classical constitutionalism was that people should have maximum freedom to bargain and to keep the property they lawfully

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64. HOVENKAMP, *supra* note 13, at 36–41.

65. See generally L.A. Powe, Jr., *Rehearsal for Substantive Due Process: The Municipal Bond Cases*, 53 TEX. L. REV. 738 (1975).

66. *Id.*

67. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

68. See *infra* text accompanying notes 77–90.

acquired, consistent with the state's obligation to control immoral conduct or protect health and safety. A second theme was that government's role in furthering economic development should be limited and passive, focusing on protection of property rights and not the creation of monopolies or other exclusive privileges. Many of the great takings controversies in post-Fourteenth Amendment Supreme Court jurisprudence have involved either conflicts between private-property ownership and a sovereign's power to promote economic development,<sup>69</sup> or else government control of private development's spillovers, such as environmental harm or destruction of historically significant structures.<sup>70</sup> The classical constitutional revolution redefined the concept of "monopoly" more broadly so as to include many government interventions in the unregulated market, whether or not they actually threatened monopoly. For example, in 1910 the New York Court of Appeals invalidated a law that required an apprenticeship and license for undertakers, citing the threat of monopoly.<sup>71</sup> While the Act added a training requirement, it did not limit the number of people who could be undertakers, and the court cited no fact that suggested monopoly was threatened.

These changes all occurred long after John Marshall's passing, however, and required dismantling of a great deal of his jurisprudence. First, it gave effect to classical ideas that required narrowing the federal commerce power so as to reduce the role of the federal government in economic development—largely the opposite of what the Marshall Court had done.<sup>72</sup> Second was a reversal of the Contract Clause doctrine created under Chief Justice Marshall, which classical critics saw as government approval of entrenched monopoly.<sup>73</sup> Third, property rights had to be expanded so as to go beyond the traditional concerns of eminent domain law, which were seizure of title or forced occupancy.<sup>74</sup> Fourth, at both the state and federal levels, an important constitutional hook for executing these changes was the rise of a "substantive" conception of due process that carried that idea's

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69. *E.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005) (involving urban development); *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982) (regarding municipal policy permitting cable television lines to cross private property); *Berman v. Parker*, 348 U.S. 26 (1954) (involving urban development); *St. Louis v. W. Union Tel. Co.*, 148 U.S. 92 (1893) (discussing construction of telegraph lines); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) (examining government construction of a dam that was flooding petitioner's property).

70. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (controlling harmful private development); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (discussing wetlands protection); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (controlling allegedly harmful private development); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (involving historic landmark preservation); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (examining comprehensive use and density restrictions).

71. *People v. Ringe*, 90 N.E. 451, 454 (1910).

72. *See infra* Part III.A and text accompanying notes 95–99.

73. *See infra* text accompanying notes 122–49.

74. *See infra* text accompanying notes 187–208.

meaning beyond its traditional concern with fair procedure, or decisions made in accordance with the existing “law of the land.”<sup>75</sup> A fifth change came in patent law, which took patent granting authority away from state legislatures and switched the focus of patent law away from promoting economic development toward the creation of a set of property rights that an inventor could assert or not at its pleasure.<sup>76</sup>

#### A. THE COMMERCE CLAUSE FROM MARSHALL TO TANEY

Chief Justice Marshall’s broad interpretation of the federal commerce power so as to limit state legislation that affected interstate commerce strengthened the role of the federal government in economic development. By contrast, the later rise of classical “dual federalism” created a hard, although somewhat indistinct, line between intrastate activities that are out of Congress’s reach, and interstate commerce that is exclusively in Congress’s control.<sup>77</sup>

*Gibbons v. Ogden*, which was a Commerce Clause challenge to a state-issued steamboat patent, held that New York had no authority to create a domestic monopoly route that interfered with a federal license to operate in interstate navigable waters.<sup>78</sup> This problem of competing state and interstate routes would arise often in the railroad industry in the late 19th century, and provoked numerous Commerce Clause battles during the period of dual federalism.<sup>79</sup> The exclusivity provision in the New York patent extended to the full boundaries of the state, although not beyond. One consequence was to make it impossible for people from Connecticut and New Jersey to travel to New York by steamboat, because the New York monopoly foreclosed outsiders’ access to New York ports.<sup>80</sup>

The Supreme Court held that the New York patent unconstitutionally interfered with interstate commerce. John Marshall’s opinion established two things: first, that the word “commerce” in the constitutional clause should be construed broadly so as to include navigation “as expressly granted, as if that term had been added to the word ‘commerce.’”<sup>81</sup> Further, the term reaches much further than “trade”:

Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by

75. See *infra* text accompanying notes 122–23, 149–50, 283–301.

76. See Hovenkamp, *supra* note 22.

77. See generally Felix Frankfurter, *Taney and the Commerce Clause*, 49 HARV. L. REV. 1286 (1936).

78. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 240 (1824); see also *infra* text accompanying notes 81–94.

79. See generally Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017 (1988).

80. P.J. Federico, *State Patents*, 13 J. PAT. OFF. SOC’Y 166, 175–77 (1931).

81. *Gibbons*, 22 U.S. at 193.

prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.<sup>82</sup>

The Commerce Clause authorizes Congress to regulate not only commerce “with” foreign nations and the Indian tribes, but also “among” the several states. Unlike many later advocates for a narrow reading, Chief Justice Marshall understood the differing meanings of “between” and “among”—a distinction that 19th-century writers took much more seriously than we do today. The word “between” is transactional and refers to movement from one place to another, such as commerce between Iowa and Illinois. The Constitution uses “between” in this transactional sense when it creates diversity jurisdiction over controversies “between” the citizens of different states<sup>83</sup>—that is, a plaintiff from one state suing a defendant from a different state.<sup>84</sup> If the drafters of the Constitution had intended to limit the commerce power to interstate shipment, they would have used the phrase: “Commerce between the several states.” On the other hand, as Chief Justice Marshall observed:

The word ‘among’ means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.<sup>85</sup>

“Comprehensive as the word ‘among’ is,” Marshall added, “it may very properly be restricted to that commerce which *concerns* more States than one.”<sup>86</sup> Epstein reads this phrase as importing a requirement limiting the power to movement across state lines.<sup>87</sup> Read in context, it means just the

82. *Id.* at 189–90; *see also* *The Wilson*, 30 F. Cas. 239, 242–43 (Marshall, Circuit Justice, C.C.D. Va. 1820) (No. 17, 846) (“From the adoption of the constitution, till this time, the universal sense of America has been, that the word ‘commerce,’ as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce.”).

83. U.S. CONST. art. III, § 2, cl. 1.

84. On the historical importance of the “between”/“among” distinction, *see generally* Herbert Hovenkamp, Essay, *Judicial Restraint and Constitutional Federalism: The Supreme Court’s Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996).

85. *Gibbons*, 22 U.S. at 194.

86. *Id.* (emphasis added); *see also, e.g.*, *N. River Steamboat Co. v. Livingston*, 3 Wheeler C.C. 483 (C.C.N.Y. 1825) (divided (22–9)) (relying on this passage to hold that even purely intrastate monopoly routes along navigable rivers, such as New York to Albany, violate the Commerce Clause).

87. EPSTEIN, *supra* note 3, at 154–55.



opposite. “Concerns” means about the same thing as “affects,” or something in which they have an interest. This is the predominant usage of the term “concern” in *The Federalist*, written during the period between the Constitution’s drafting and ratification.<sup>88</sup> Chief Justice Marshall gave this explanation:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.<sup>89</sup>

This was nearly as strong a statement of “affecting commerce” as might be found in decisions a century and a half later. The exclusivity provision in New York’s steamboat patent affected trade along a partially competing interstate route, and that was all that was required. Marshall then added that “the power to regulate” commerce

is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.<sup>90</sup>

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88. *E.g.*, THE FEDERALIST NO. 14, at 70 (James Madison, Nov. 30, 1787) (Oxford Univ. Press 2008) (stating that power to make laws is “limited to certain enumerated objects, which concern all the members of the republic”); THE FEDERALIST NO. 45, at 232 (James Madison, Jan. 26, 1788) (Oxford Univ. Press 2008) (“[P]owers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people . . . .”); THE FEDERALIST NO. 80, at 388 (Alexander Hamilton, June 21, 1788) (Oxford Univ. Press 2008) (stating that judicial power extends to cases “which concern the execution of the provisions expressly contained in the articles of Union”).

89. *Gibbons*, 22 U.S. at 195.

90. *Id.* at 196–97. Speaking five years later in *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829), the Chief Justice saw no problem with a federal statute that controlled internal navigation “over those small navigable creeks into which the tide flows.” *Id.* at 252. However, the Court then found that a state could lawfully erect a dam on such a creek when Congress had not regulated at all. *Id.*

States rightists were livid. “Do we not know that . . . more danger is now to be apprehended from tyranny in the head than from anarchy in the extremities?” Congressman Andrew Stevenson of Virginia complained in colorful federalist language in a House Report on traffic and navigation.<sup>91</sup> “Do we suppose that the people are willing to abandon their State governments as useless corporations?”<sup>92</sup> As a result of the decision, “[w]e are now sweeping down at one blow the independence and power of the State Governments.”<sup>93</sup> As the great Supreme Court historian Charles Warren wrote in the 1920s, the steamboat case “marked another step in the broad construction of the Constitution, and became at once a mighty weapon in the hands of those statesmen who favored projects requiring the extension of Federal authority.”<sup>94</sup>

The Marshall Court’s Commerce Clause analysis presents a sharp contrast to that of the Jackson Era. This revolution was abetted by Jackson’s 1836 appointment of his former Attorney General, Maryland Catholic Roger Brooks Taney, to be Chief Justice of the Supreme Court. Constitutional scholar Edward S. Corwin gave the name “dual federalism” to the wall that the Taney Court created between federal and state power, recognizing broad state freedom to regulate internally, even if the regulations affected interstate commerce.<sup>95</sup> For example, Taney’s opinion for the Court in the *License Cases* refused to find any limitation on state power to tax goods in commerce once they had arrived in the state.<sup>96</sup> He made this point even more forcefully two years later in his dissent from the Court’s 5–4 decision in the *Passenger Cases*, which struck down state attempts to tax incoming ships based on the number of passengers that disembarked.<sup>97</sup> There, Taney concluded that the federal commerce power clearly did not extend over “the intercourse of persons passing from one State to another.”<sup>98</sup> He continued:

And if Congress, under its power to regulate commerce with foreign nations, possesses the power claimed for it in the decision of this case, the same course of reasoning and the same rule of construction (by substituting intercourse for commerce) would give the general

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91. 1 ANNALS OF CONG. 1267 (1824) (Joseph Gales ed., 1856).

92. *Id.*

93. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 77 (Beard Books 1999) (1922).

94. *Id.* at 76.

95. See generally Edward S. Corwin, *Congress’s Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORN. L.Q. 477 (1933); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

96. The *License Cases*, 46 U.S. 504 (1847) (involving principally Massachusetts, Rhode Island, and New Hampshire in which a divided Court upheld the power of these states to regulate the sale of liquor that had been imported from outside the state).

97. The *Passenger Cases*, 48 U.S. 283 (1849).

98. *Id.* at 493.

government the same power over the intercourse of persons between different States.<sup>99</sup>

One important difference between Marshall Era Commerce Clause jurisprudence and dual federalism lay in the inability of the latter to control state regulatory “spillovers.” Many nominally intrastate practices, such as transport route exclusivity that extended to the border, affected surrounding states or the relationship between states—a phenomenon well known to Gilded Age railroad economists.<sup>100</sup> Writing in 1908, Woodrow Wilson criticized the maze of inconsistent state regulations that, while enforced exclusively within their individual boundaries, were creating a patchwork that imposed considerable costs on interstate business.<sup>101</sup> In Chief Justice Marshall’s view, the federal government had the power to control for these. Dual federalism was much more resistant. For example, the *E.C. Knight* antitrust decision, during the heyday of dual federalism in the 1880s, refused to apply federal antitrust law to condemn a monopoly of sugar intended for transport into other states.<sup>102</sup> Limiting the Marshall Era *Gibbons* decision, the Supreme Court stated that “Commerce succeeds to manufacture, and is not a part of it.”<sup>103</sup> Chief Justice Fuller’s majority opinion indicated that each state, not the federal government, was empowered to relieve its citizens from the burdens of monopoly.<sup>104</sup> But that stated the economic concern backwards. The government’s lawsuit was predicated on the fact that the sugar was being shipped outside the state. New York, the producing state, was the beneficiary of the monopoly, which was visiting its harm elsewhere.

The same thing was largely true of *Hammer v. Daghenhart*, the 1918 decision striking down a federal child labor statute that applied only to goods destined for shipment across a state line within 30 days of their manufacture.<sup>105</sup> The non-progressive Justice Holmes’ dissent made the point that the statute merely regulated what could be shipped across a state line—something that clearly would have fallen within Chief Justice Marshall’s vision of the commerce power.<sup>106</sup> That was a point that subsequent critics have missed:<sup>107</sup> Congress was not regulating child labor; it was regulating the

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99. *Id.* at 494.

100. See Robert Mather, *How the States Make Interstate Rates*, 32 ANNALS AM. ACAD. POL. & SOC. SCI. 95, 107–09 (1908); William Z. Ripley, *The Trunk Line Rate System: A Distance Tariff*, 20 Q.J. ECON. 183, 183–84 (1906).

101. See generally Woodrow Wilson, *The States and the Federal Government*, 187 N. AM. REV. 684 (1908).

102. *United States v. E.C. Knight Co.*, 156 U.S. 1, 16–18 (1895).

103. *Id.* at 12.

104. *Id.* at 11 (“The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with . . .”).

105. *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (Holmes, J., dissenting).

106. *Id.* at 277–78.

107. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 115–16 (2001).

interstate movement of goods made with child labor, under a constitutional provision that placed no limits on the rationale for the regulation.

In sum, there is little evidence of a “classical liberal” Commerce Clause jurisprudence prior to the rise of the Taney Court in the 1830s, when dual federalism took root and would dominate Commerce Clause jurisprudence for the next century.

B. THE CONTRACT CLAUSE AND THE INVENTION OF THE LEGISLATIVE CAPTURE  
DOCTRINE

Article I’s Contract Clause is one of the few express imitations on state power in the original Constitution, including the pre-incorporation Bill of Rights.<sup>108</sup> The Contract Clause does not place any limit on state power to control contracts to be made in the future, rather, it prohibits a state from impairing an obligation created by a contract that was lawful at the time it was made. As a result it never provided a defensible rationale for economic substantive due process doctrine, which limited state power to limit contracts to be made in the future.

Early on, Supreme Court Contract Clause jurisprudence divided into two branches: private and public. The “private” branch applied to agreements between private parties, most particularly creditor–debtor agreements. Under this branch the Marshall Court substantially limited state debtor relief laws or statutes that were thought to interfere with federal bankruptcy law.<sup>109</sup> During the Taney period, the Supreme Court did not relent from close scrutiny of such statutes, frequently striking them down.<sup>110</sup>

By contrast, the “public” branch of Contract Clause jurisprudence dealt with grants made by a state or subdivision to a private entity. Initially, *Fletcher v. Peck* (1810) held that a state-issued deed to land was a contract that the state legislature could not later rescind, even if it had been fraudulently induced.<sup>111</sup> In the *Dartmouth College* case in 1819, the Marshall Court extended this rule to a corporate charter, holding that once a state granted a charter it could not be altered in a way disadvantageous to the grantees.<sup>112</sup>

The *Dartmouth College* doctrine quickly produced case law holding that state inducements given to business corporations are irrevocable, except as limited by the express terms of the grant. In order to finance infrastructure, many states chartered private corporations to build such facilities as toll roads, bridges and later railroads. The inducements provided in corporate charters

108. U.S. CONST. art. I, § 10, cl. 1.

109. See, e.g., *Mason v. Haile*, 25 U.S. (12 Wheat.) 370 (1827); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); see also HOVENKAMP, *supra* note 13, at 17–35.

110. See generally *Gantly’s Lessee v. Ewing*, 44 U.S. (3 How.) 707 (1845); *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843).

111. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142–43 (1810).

112. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 665–66 (1819).

included such things as grants of free land, monopoly rights, tax exemptions, bounties, eminent domain power, or other special privileges. All of this was quite consistent with pre-classical, Hamiltonian statecraft, which believed that capital would not naturally flow into profitable enterprises. Rather it had to be induced by active government policy. Protection from competition was a way of ensuring profitability. During the first two decades of the 19th century the rate of such charter grants increased tenfold.<sup>113</sup> Later in the century, after the *Dartmouth College* doctrine had been significantly weakened, states switched to more direct forms of financial inducement, typically financed by public bonds.<sup>114</sup>

By contrast, classicists believed that capital would flow naturally into profitable projects and that state initiatives were improper for two reasons. First, even when they were well intentioned, states were not as good as markets in determining if particular projects would be profitable. Second, politics inevitably biased the state's selection of recipients of this largesse, as well as its scope. Maine's Chief Justice John Appleton stated the classical position in 1871, in a decision holding that local governments did not have the authority to grant subsidies to individuals to encourage investment in local industry:

Capital naturally gravitates to the best investment. If a particular place or a special kind of manufacture promises large returns, the capitalist will be little likely to hesitate in selecting the place and in determining upon the manufacture. But whatever is done, whether by the individual or the corporation, it is done with the same hope and expectation with which the farmer plows his fields and sows his grain,—the anticipated returns.<sup>115</sup>

By the 1820s a broad and diverse political movement opposed state grants of monopoly charters and other special privileges in order to induce investment. The opposition was clearly reflected in the four-party presidential election of 1824, where Andrew Jackson captured 42% of the popular vote, against 32% for John Quincy Adams, 13% for Henry Clay, and 13% for William H. Crawford.<sup>116</sup> The election went to the House of Representatives, however, where an infamous "corrupt bargain" between Adams and Clay gave Adams the presidency, making Clay Secretary of State. Four years later Andrew Jackson got his revenge, winning the presidency with 56% of the popular vote to Adams' 44%.<sup>117</sup>

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113. See HOVENKAMP, *supra* note 13, at 17–35. On the rapidly increasing rate of state grants, see Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1440–42 (1999).

114. See *infra* text accompanying notes 174–87.

115. *In re* Opinion of the Justices, 58 Me. 590, 592 (1871). On Appleton, see generally DAVID M. GOLD, *THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM* (1990).

116. JOHN M. MURRIN et al., *LIBERTY, EQUALITY, POWER: A HISTORY OF THE AMERICAN PEOPLE*, VOLUME I: TO 1877, at 254 (6th ed. 2014).

117. *Id.* at 257.

No decision symbolizes the rise of classical constitutionalism better than the *Charles River Bridge* case, where the new Chief Justice debated with Justice Story whether corporate charters for the creation of public works should imply a monopoly right protecting the investment from competition.<sup>118</sup> Against Taney's conclusion for the majority that "in grants by the public, nothing passes by implication,"<sup>119</sup> Federalist Story protested in dissent that

I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain and questionable, both as to security and as to productiveness. No man will hazard his capital in any enterprise, in which, if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slightest security of enjoying the rewards of that success, for a single moment. If the government means to invite its citizens to enlarge the public comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge, that the property will be safe; that the enjoyment will be co-extensive with the grant; and that success will not be the signal of a general combination to overthrow its rights, and to take away its profits.<sup>120</sup>

In contrast to the Marshall Court, the Taney Court used every device at its disposal to limit monopoly grants. Indeed, when he was Attorney General to President Jackson, Taney had written a legal opinion concluding that states did not have the power to grant permanent monopoly rights.<sup>121</sup>

By the time of Reconstruction, the *Dartmouth College* holding had been almost completely upended. To see just how classical the Constitution's theory of economic development had become, one need only compare the *Charles River Bridge*, case with the *Slaughter-House Cases* 35 years later. In *Charles River Bridge* the plaintiffs made a serious challenge and obtained agreement from the Court's four ageing Federalists and Whigs that a corporate charter implied a monopoly provision. By contrast, in the *Slaughter-House Cases* the plaintiffs obtained four votes for the view that the Constitution forbade a state from placing a monopoly grant in a corporate charter for a slaughterhouse.<sup>122</sup>

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118. *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

119. *Id.* at 546.

120. *Id.* at 608 (Story, J., dissenting).

121. *Opinion of Mr. Taney, Attorney General of the United States, on the Validity of the Law of New Jersey, Under Which the Camden & Amboy Railroad, and the Delaware and Raritan Companies, Claim a Monopoly*, 45 NILES' WKLY. REG. 151, 151 (1833); see also EDWIN MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS* 125 (1954); CARL BRENT SWISHER, *ROGER B. TANEY* 363–67 (1935). Taney was Attorney General from 1831 to 1833.

122. See generally *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). On the underlying dispute, see Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1284–92 (1984).

The contemporary literature largely ignored a significant public health problem that probably served to justify the price-regulated public utility that New Orleans created, and instead resorted to the explanation that the monopoly had been created by bribery and corruption.<sup>123</sup>

In sum, the classical position on the government and economic development did not become embedded in American statecraft until the mid-19th century. The significance of the change in constitutional doctrine is clear in the writings of the more distinctly classical law-treatise authors, who did their most important work in the late 1860s and after. Their target was not progressive regulatory legislation, which was not yet on the horizon. Rather, they attacked the “vested rights” doctrine—in particular the *Dartmouth College* decision.

The principal Reconstruction and Gilded Age theorists of what came to be economic substantive due process were Thomas M. Cooley, John F. Dillon, Christopher Tiedeman, and Francis Wharton.<sup>124</sup> Just as these writers were developing liberty-of-contract doctrine they also worked mightily to dismantle the public branch of Marshall Era Contract Clause jurisprudence. What is not always appreciated is that they devoted as many intellectual resources to undermining *Dartmouth College* as they did to creating the infrastructure for constitutional liberty of contract.

Economic substantive due process originated in the state courts and reflected a strong anti-regulation bias in Jacksonian democracy.<sup>125</sup> Thomas M. Cooley, whose highly influential treatise on *Constitutional Limitations* began to develop the doctrine, was Chief Justice of the Michigan Supreme Court from 1864 to 1885. He had begun his career as a Jacksonian democrat but later became an abolitionist and switched to the Republican Party. The first edition of *Constitutional Limitations* was published in 1868, the same year that the

123. See Hovenkamp, *supra* note 122, at 1303 & n.228 (explaining the public-health and priceregulation issues); *id.* at 1296 (explaining the bribery and corruption claims).

124. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 275–93 (Alexis C. Angell ed., 6th ed. 1890); JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS 162–73 (2d ed. 1873); CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES § 94 (1900) [hereinafter TIEDEMAN, STATE AND FEDERAL CONTROL]; CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (1886) [hereinafter TIEDEMAN, POLICE POWER]; FRANCIS WHARTON, COMMENTARIES ON LAW, EMBRACING CHAPTERS ON THE NATURE; THE SOURCE; AND THE HISTORY OF LAW ON INTERNATIONAL LAW; PUBLIC AND PRIVATE; AND ON CONSTITUTIONAL AND STATUTORY LAW §§ 477–502 (1884); see also JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES §§ 540–620 (1886); *Constitutional Law*, 94 N. AM. REV. 435–63 (1862). The work of others is summarized in Hovenkamp, *supra* note 21, at 397–98.

125. HOVENKAMP, *supra* note 13, at 171–92; SELLERS, *supra* note 17, at 50–54; Edward Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911); Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2319–20 (1995) [hereinafter Hovenkamp, *Cultural Crises*]; Ryan Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

Fourteenth Amendment was ratified. Cooley's stated concern was with limitations on the power of the states, not the federal government, and also with state as well as federal constitutional law. Cooley's discussions often mixed the two, not making clear whether the principle he was developing came from the federal or a state constitution.

Cooley and other Gilded Age constitutional law writers were the first to develop a systematic theory that the federal and state constitutions should be interpreted so as to limit the influence of special interests. They were not the first to observe the problem. James Madison, particularly in *Federalist No. 10*, had been highly concerned with the problem of "factions" that might hijack the government for their own ends.<sup>126</sup> But Madison's solutions were purely structural. He defended constitutional provisions such as those providing for staggered legislative and presidential terms, indirect election of the President and Senators, and the other checks and balances dividing authority between the federal legislative and executive branches, as combatants to capture.<sup>127</sup> Richard Epstein observes, and I agree, that these structural limitations in the Federal Constitution turned out to be "woefully inadequate" for controlling factions.<sup>128</sup> A distinguishing feature of Gilded Age constitutionalism was state and federal judges' increasing recognition of the capture problem.

Nevertheless, courts had only limited explicit authority to proceed. Neither federal nor state constitutions provided a textual hook for judicial review of legislation simply because that legislation reflected excessive special-interest influence. Prior to the Fourteenth Amendment, a partial answer lay in narrowing the one Marshall Era doctrine that seemed most conducive to capture, namely, the Contract Clause. After the Fourteenth Amendment was ratified, the Due Process and Equal Protection Clauses began to pick up this role. However, those clauses were intended largely to protect recently freed slaves from discriminatory state law-making, not as a general brake on economic regulation.

In the views of Cooley and Wharton, the Contract Clause in particular had become the vehicle for capture by powerful interest groups. Historically, Chief Justice Marshall's extension of the term "contract" to legislatively granted corporate charters reflected the dominant Framers' concern with legislative attempts to renege on previously held rights. To that extent the Contract Clause operated similarly to the constitutional provisions prohibiting bills of attainder and ex post facto laws, all retroactivity provisions that were grouped together in Article I, Section 10.<sup>129</sup> At the same time, however, the history of the contract clause reflects a predominant concern

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126. THE FEDERALIST NO. 10 (James Madison, Nov. 22, 1787).

127. *Id.*

128. EPSTEIN, *supra* note 3, at 22.

129. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .").



with state attempts to interfere with private debtor–creditor relations, not with state-created grants used to encourage economic development.<sup>130</sup> Nevertheless, *Dartmouth College's* application of the Contract Clause to a corporate charter was not regarded as particularly controversial when it issued.<sup>131</sup>

By one historian's count, some 90% of 19th-century Supreme Court Contract Clause decisions involved corporate charters.<sup>132</sup> In general, the trend of Marshall Court decisions was to expand the protections given under corporate charters, while the trend of Taney Court was to diminish them, beginning with Taney's conclusion in the *Charles River Bridge* case that a monopoly provision would not be recognized unless it was explicit in the grant.<sup>133</sup>

Siding with Taney, Cooley added this footnote to the second edition of his treatise on *Constitutional Limitations* in 1871:

It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large and upon the legislation of the country, than the States to which they owed their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretence—being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless or corrupt legislation . . .<sup>134</sup>

In addition, Cooley argued, the legislature should be deemed powerless to contract away its police power.<sup>135</sup> Writing as Chief Justice of the Michigan Supreme Court, Cooley held in the *East Saginaw* case that a state statute intended to further investment in salt manufacturing by paying a ten-cent bounty on each bushel of salt and exempting salt-producing land from property taxes and could be repealed, even if the statute were construed as a

130. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 274 (1985).

131. See Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 31–33 (1986). But see Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 539–40 (1987).

132. BENJAMIN FLETCHER WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 243 (1938).

133. *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 487 (1837). Chief Justice Taney relied on a Marshall Era decision holding that a land grant from the state did not imply a covenant that a subsequent legislature would pass no statutes affecting the value of use of that land. *Jackson v. Lamphire*, 28 U.S. (3 Pet.) 280, 289 (1830).

134. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 278 n.2 (2d ed. 1871).

135. *Id.* at 333–39.

contract with the complainant.<sup>136</sup> The Court was interpreting the Federal Contract Clause.<sup>137</sup> Cooley concluded:

It cannot fail to strike the mind when this claim is put forth, that the most serious and alarming consequences may flow from it, should it receive the sanction of the courts. The demand of exemption is made under that clause of the Constitution of the United States, which forbids the States to pass any laws violating the obligation of contracts; and the argument is, that the corporation, by accepting the offer which the State made to those who should engage in the development of its resources, in salt, and by actually obtaining a productive well, has thereby entered into a contract with the State, by which, in consideration of continued manufacture, the State for all time so ties up its hands as to preclude the exercise of the power of taxation in regard to all property which complainant may employ in the business.<sup>138</sup>

That theme would frequently resurface in later public-choice literature—namely, that special-interest legislation should be viewed as a kind of “contract” with those who obtained it, rather than enactments in the public interest. Writing in 1853, Taney elaborated on these concerns. Referring to special privileges in corporate grants he opined that almost every bill of incorporation:

[I]s drawn originally by the parties who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called on to act.

On the other hand, those who accept the charter have abundant time to examine and consider its provisions, before they invest their money.<sup>139</sup>

Francis Wharton went even further in his 1884 *Commentaries*, suggesting that *Dartmouth College* reflected an obsolete theory of statecraft and should no longer be regarded as the law:

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136. *E. Saginaw Mfg. Co. v. City of E. Saginaw*, 19 Mich. 259, 269, 287–88 (1869); *accord Opinion of Mr. Taney, Attorney General of the United States, on the Validity of the Law of New Jersey, Under Which the Camden & Amboy Railroad, and the Delaware and Raritan Companies, Claim a Monopoly*, *supra* note 121, at 151.

137. *E. Saginaw Mfg. Co.*, 19 Mich. at 262.

138. *Id.* at 273.

139. *Ohio Life Ins. & Tr. Co. v. Debolt*, 57 U.S. (16 How.) 416, 435–36 (1853).

The policy of irrevocably granting away public franchises, and fixing social rights in a constant perpetual mould, has become far more questionable with the lapse of years than it was at the time the business of the country was only slowly recovering from the paralysis produced by the war of 1812 . . . . In those days . . . when an apparently permanent type had been assumed by society, there was nothing startling in the position that an adjustment of social rights made by any particular legislature should bind forever. Now, however, we have been taught by the great inventions of steam and of the telegraph, by the marvellous improvements of machinery by which industries of all kinds have been remodelled, and by the introduction of new staples displacing old, that the stationary and apparently immutable condition of society during the first quarter of the present century was exceptional, and that the normal type of social life, as of all other kinds of life, is mutability tending to development.<sup>140</sup>

Christopher Tiedeman, another architect of economic due process, later wrote in his 1900 treatise on constitutional rights:

[T]he intention of a legislature to place a private corporation beyond the reach of the police power of the State—to grant to a corporation the right to do what it pleases in the exercise of its corporate powers, it matters not how much injury is inflicted upon the public, and yet be subject to no control or restraint, which is not provided by the laws in force when the charter was granted—is so manifestly unreasonable that we cannot suppose that the legislature so intended, unless this extraordinary privilege is expressly granted.<sup>141</sup>

Subsequent to the *Slaughter-House Cases*,<sup>142</sup> the New Orleans slaughterhouse monopoly became unpopular. Riding the crest of popular anger over monopoly, the state adopted a new constitution in 1879, abolishing most monopoly charters.<sup>143</sup> The state then withdrew the slaughterhouse charter, thus inviting the inevitable Contract Clause challenge.<sup>144</sup> The second Supreme Court decision, this time by Justice Miller, held that one legislature could not “bargain[] away by contract” a later

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140. WHARTON, *supra* note 124, § 483, at 556.

141. 2 TIEDEMAN, *STATE AND FEDERAL CONTROL*, *supra* note 124, § 209, at 952.

142. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *see also supra* text accompanying notes 122–23.

143. LA. CONST. art. 258 (1879) (“[T]he monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished.”).

144. *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746 (1884).

legislature's power to repeal a monopoly grant.<sup>145</sup> Both the sixth edition of Cooley's *Constitutional Limitations* (1890)<sup>146</sup> and Tiedeman's *Police Power* (1886) enthusiastically agreed. First, Cooley chastised the majority holding in the first *Slaughter-House* case because "the grant of a monopoly in one of the ordinary and necessary occupations of life must be as clearly illegal in this country as in England; and it would be impossible to defend and sustain it."<sup>147</sup> He then fully embraced the holding in the second *Slaughter-House* decision, concluding that "the legislature could not by a grant of this kind make an irrevocable contract."<sup>148</sup> Tiedeman agreed, concluding that "the State cannot barter away its police power."<sup>149</sup>

An important theme in the Jacksonian reaction to preferences created in corporate grants was suspicion of special-interest capture. Economic substantive due process doctrine came to reflect the same concerns. They emerged full blown during the *Lochner* era, which often struck down economic regulations based on a suspicion that the statute in question was passed at the behest of a favored interest group.<sup>150</sup> The classical view, expressed in a variety of doctrines, was quite simply that legislatures could not be trusted.

### C. THE "PUBLIC PURPOSE" DOCTRINE: FEDERAL AND STATE

Classical statecraft insisted that most human economic interactions be private, and generally by mutual agreement. The State could intervene only in furtherance of a narrowly defined "public" purpose or use. At the policy level, the idea gradually evolved into the notion that government intervention was appropriate only in the event of a "market failure," although 19th-century advocates did not use that term. These views would have strong implications for the constitutional theory of public finance.

Judicially, doctrine limiting public involvement in the development of infrastructure or business facilities appeared in a wide variety of contexts, including the proper scope of the eminent domain power and the taxing power. The principal constitutional clause that can be construed to create such a limitation is the Takings Clause of the Fifth Amendment, providing that: "[N]or shall private property be taken for public use, without just compensation."<sup>151</sup> While the Federal Takings Clause was not applied against the states until the 1890s, state constitutions had their own takings clauses. Further, federal and state law both recognized a "public purpose" doctrine

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145. *Id.* at 750.

146. COOLEY, *supra* note 124, at 341–42.

147. *Id.* at 342.

148. *Id.* at 343 n.1.

149. TIEDEMAN, *POLICE POWER*, *supra* note 124, at 582.

150. HOVENKAMP, *supra* note 6, at 266–67.

151. U.S. CONST. amend. V.

that was not explicit in the Constitution outside of the takings context, but that served to limit the range of government action.

The public purpose doctrine never became as far-reaching or durable within constitutional doctrine as economic due process doctrine was to become. Its high point was the 1875 *Topeka* holding striking down a state statute that authorized municipalities to levy taxes for the building of railroads and bridges.<sup>152</sup> The bridge in question was incorporated but privately owned. Justice Miller's opinion for the Court never cited the United States Constitution, although he did mention a provision of the 1859 Kansas Constitution requiring the legislature to authorize municipalities to tax but also limiting "abuse" of that power.<sup>153</sup>

Justice Miller's opinion relied mainly on the treatise on municipal corporations authored by John H. Dillon, who had also been the reporter for the decision below,<sup>154</sup> as well as *Constitutional Limitations*. Justice Cooley had declared:

[T]axation having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized.<sup>155</sup>

Cooley himself had cited several decisions in support of his argument for a public purpose limitation, although they all came from state courts interpreting their own constitutions. The strongest language was dicta from an 1865 Wisconsin decision stating that "[t]he legislature cannot create a public debt, or levy a tax . . . in order to raise funds for a mere private purpose" where "the public interest or welfare [is] in no way connected with the transaction."<sup>156</sup> Nevertheless, that court went on to uphold as sufficiently "public" a tax intended to compensate Civil War draftees for the expense of buying themselves out of the draft, as federal draft legislation prior to 1865

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152. *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 657 (1874) ("The council shall have power to . . . issu[e] . . . bonds . . . not exceeding ten per cent per annum." (quoting Kansas Laws, Ch. LXVIII, Sec. 1 (1872))); see also *Cole v. City of La Grange*, 113 U.S. 1, 6 (1885) (finding subsidy for iron company improper taxation for benefit of private person); *City of Parkersburg v. Brown*, 106 U.S. 487, 501 (1883) (finding manufacturing subsidy bonds invalid under state law as taxation for private purpose); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1635–36 (1988).

153. *Topeka*, 87 U.S. at 657–58 ("Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation . . . shall be so restricted as to prevent the abuse of such power." (quoting KAN. CONST. art. 12, § 5 (1859))).

154. DILLON, *supra* note 124; see also *Citizens' Sav. Ass'n v. City of Topeka*, 5 F. Cas. 737 (C.C.D. Kan. 1874) (No. 2734).

155. COOLEY, *supra* note 124, at 598–99.

156. *Brodhead v. City of Milwaukee*, 19 Wis. 624, 652 (Wis. 1865). Cooley also cited *Tyson v. School Directors*, 51 Pa. 9 (1865), which struck down a similar provision on the grounds that it was judicial action disguised as state legislation. COOLEY, *supra* note 124, at 602 n.3.

permitted.<sup>157</sup> Other decisions that Cooley cited either stood for the opposite proposition that Cooley was asserting,<sup>158</sup> or they were not on point at all.<sup>159</sup> In sum, Cooley largely invented the “public purpose” taxation doctrine, with little support from case law and none from state or federal constitutional texts.

The noninterpretivist nature of the *Topeka* decision provoked a dissent by Justice Nathan Clifford, anticipating many dissents that would be written during the substantive due process era:

Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism. . . .

Unwise laws and such as are highly inexpedient and unjust are frequently passed by legislative bodies, but there is no power vested in a Circuit Court nor in this court, to determine that any law passed by a State legislature is void if it is not repugnant to their own constitution nor the Constitution of the United States.<sup>160</sup>

In any event, the *Topeka* doctrine as a constitutional limitation on taxing power did not have a lengthy run.<sup>161</sup> By the late 19th century, prior to *Lochner*, it had fallen into disuse in the federal courts, and was rejected even by some Justices who embraced economic substantive due process doctrine. For example, in 1896, *Lochner* author Justice Rufus Peckham upheld a tax scheme to provide subsidies for the irrigation of privately owned arid farmland.<sup>162</sup> Variations of the doctrine retained some traction under state constitutions. For example, the Court considered many challenges to government issued

157. JOHN REMINGTON GRAHAM, A CONSTITUTIONAL HISTORY OF THE MILITARY DRAFT (1971).

158. COOLEY, *supra* note 124, at 602 (citing *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 168 (Pa. 1853), which upheld a tax assessed for the purpose of purchasing shares in a railroad corporation).

159. *Id.* at 599 (citing *Morford v. Unger*, 8 Iowa 82 (1859), which upheld a municipal annexation of adjacent land over protest by farmers that their taxes would increase, and *Freeland v. Hastings*, 92 Mass. 570, 575 (1865), which rejected a taxpayer's challenge to a tax on the ground that its purpose had not been adequately specified, stating that that every citizen has a right “to insist that no unlawful or unauthorized exaction shall be made upon him under the guise of taxation” since municipalities have only the authority granted to them by their state and a municipality cannot assess a tax that the state had not authorized).

160. *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 669 (1874) (Clifford, J., dissenting).

161. See Hovenkamp, *supra* note 152, at 1638–40 (tracing the subsequent history of *Topeka*). Professor Epstein does not discuss this history. See generally EPSTEIN, *supra* note 3.

162. *E.g.*, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 178 (1896); see also *Green v. Frazier*, 253 U.S. 233, 243 (1920) (upholding a tax to subsidize construction of grain mill and elevator).

municipal bonds for financing private economic development. These were, for the most part, diversity cases not implicating federal constitutional law.<sup>163</sup>

*D. CONSEQUENTIAL LOSSES FROM ECONOMIC DEVELOPMENT: THE RISE OF INVERSE CONDEMNATION*

Just as Contract Clause jurisprudence, shifts in eminent domain “takings” doctrine reflected changing attitudes toward state involvement in economic development. The classical position is easily stated: First, the market can generally be trusted to produce socially valuable investments. If a project requires a government inducement, it is not likely to be worth its costs. Second, if an investment is, in fact, socially valuable it should be able to bear all of the costs it imposes on others who might be affected.<sup>164</sup> For example, part of the cost of building a dam or reservoir (whether public or private) is the injuries imposed on upstream property owners whose land is flooded or access limited. The best way to insure that investments are efficient is to require the developer to compensate all those who are injured. That should guarantee that the value of the investment is at least as great as the losses that it imposes. Further, in measuring injury the distinction between “trespassory” injuries involving expropriation of property or invasion over boundary lines, and “nontrespassory” losses, is really not very important. Both types of injury can be very real.<sup>165</sup> John Lewis, America’s most prominent Gilded Age scholar of eminent domain, reached these conclusions in the 1880s, referring mainly to state constitutional law. The Fifth Amendment Takings Clause was not incorporated against the states until 1897.<sup>166</sup>

Judicial doctrine under the Federal Takings Clause has never really followed the classical position very closely, not even during the economic due process era. Under the U.S. Constitution, government *trespasses* can be unlawful takings even if the harm they cause is miniscule.<sup>167</sup> By contrast, nontrespassory land-use restrictions that impose significant economic harms are often found not to require either the exercise of the eminent domain power or compensation to injured landowners.<sup>168</sup> Gilded Age state

163. See Powe, *supra* note 65, at 740–41; see also *Gelpke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 206 (1864) (interpreting the Iowa Constitution to prohibit the use of tax-supported bonds to support private construction).

164. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (giving a forceful statement of the classical position).

165. *Id.*

166. *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 228 (1897).

167. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (finding a taking for the laying of cable TV lines across a roof of a Manhattan apartment building).

168. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978) (upholding a historic landmark designation that limited further development); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396 (1926) (upholding a comprehensive zoning plan without awarding compensation to a plaintiff for significant loss of value to their property); *Welch v. Swasey*, 214

constitutions that included “taking or damaging” provisions, discussed below, reached much further.<sup>169</sup>

### 1. “Public Use”

Nineteenth-century law concerning private-property rights and government economic development focused largely on two questions. First, what is the range of injuries to property for which compensation must be paid? Second, what is the landowner’s right to initiate proceedings against the government for invasions or injuries that did not result from an express exercise of the eminent domain power? Because the Fifth Amendment was not yet applied against the states, and the federal government itself was not heavily involved in development projects, the cases almost all involved state constitutions.<sup>170</sup>

The common law rules for trespassory harms caused by *private* parties were well developed. A physical appropriation or actual invasion of land could be protected by common law actions for ejectment or trespass. “Nontrespassory” injuries were much more difficult to evaluate. The common law doctrine of nuisance developed the largely unhelpful principle of *sic utere tuo ut alienum non laedas*, or “use your own property so as not to injure that of another.” The phrase was widely criticized as useless. In his 1859 treatise on torts, Francis Hilliard concluded that nuisance law covered an “*undefined injury*” and resorted to a simple list of activities that courts had condemned as nuisances.<sup>171</sup> Holmes regarded the *sic utere* principle as no more than “a benevolent yearning.”<sup>172</sup>

As the amount and variety of economic development expanded in the second half of the 19th century, American courts increasingly confronted government activity that caused significant injury to property even when no trespass or expropriation occurred. Nevertheless, requiring compensation for every injury would have been a much more strenuous requirement than the common law had ever imposed on private parties. The “trespassory” formulation of traditional eminent domain, which limited legal redress to actions that actually expropriated property or invaded its boundaries, created a relatively clear line between compensable and noncompensable harms. Equally clearly, however, it left many significant injuries uncompensated. One important element in classical liberalism’s protection for private property was its insistence that the costs of economic development be internalized, and this

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U.S. 91, 108 (1909) (upholding Boston building height restriction, notwithstanding harm to intending developers).

169. See *infra* text accompanying notes 195–216.

170. See *Chi., Burlington & Quincy R.R. Co.*, 166 U.S. at 226; *Santa Clara Co. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

171. 2 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 66–67 (1859); see also HOVENKAMP, *supra* note 6, at 129–32.

172. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894).



necessitated that injuries to others be compensated. Further, the range of harms was not limited by physical property boundaries.

During the Early National Period, the principle of just compensation was not consistently established in American law, not even under Revolutionary Era state constitutions. Reflecting pre-classical values, the first state constitutions tended to emphasize the use of government power to facilitate development and were much less concerned with compensation for injured owners. Some states authorized the taking without compensation of undeveloped land for the creation of roads or streets,<sup>173</sup> while others required it.<sup>174</sup> Many courts indulged a presumption, whether or not historically justified, that grants of land from the sovereign implicitly included a six-percent excess that could later be taken back without compensation for road construction.<sup>175</sup> The courts divided on the question of “offsets” from enhanced value. Several state statutes provided that when the coming of a railroad, canal, or other public improvement enhanced the market value of the comdemnee’s property, the enhancement could be used as an offset against the damages award. This sometimes left the land owner with nothing.<sup>176</sup> As developed below, in the 1830s and after courts came to embrace more classical ideas about the role of the state in economic development. The result was both stricter compensation requirements and a narrowed view of “public use.”<sup>177</sup>

173. *E.g.*, *Territory v. Hattick*, 2 Mart. (o.s.) 87 (Orleans 1811); *M'Clenachan v. Curwen*, 6 Binn. 509 (Pa. 1802) (holding that the compensation for a road was limited to the value of its improvements); *Feree v. Meily*, 3 Yeates 153 (Pa. 1801) (same). As late as 1851, the Georgia Supreme Court held that no compensation was required for a road built over the land owner's unenclosed land. *Parham v. Justices of the Inferior Court*, 9 Ga. 341 (1851).

174. *E.g.*, *Perry v. Wilson*, 7 Mass. 393 (1811) (requiring compensation); *Commonwealth v. Blue-Hill Tpk. Corp.*, 5 Mass. 420 (1809) (same); *Commonwealth v. Coombs*, 2 Mass. 489 (1807) (requiring compensation but permitting offset for enhanced value); *Commonwealth v. Peters*, 2 Mass. 125 (1806) (same); *In re New Mkt St.*, 4 Yeates 133 (Pa. 1804); *Lindsay v. Comm'rs*, 2 S.C.L. 38 (Ct. App. 1796) (divided court) (same); *Attorney-Gen. v. Turpin*, 13 Va. 548 (1809) (same).

175. *M'Clenachan*, 6 Binn. at 512–13 (remanding to consider whether each grant of land contained a six-percent overage subject to later condemnation for roads without compensation, as developer alleged); *Feree*, 3 Yeates at 155 (“[E]very grant of lands made an allowance of six acres in each hundred for roads and highways.”); *cf. Lindsay*, 2 S.C.L. at 49–50 (equally divided court) (stating that the right to take back a portion of property for public streets and roads is inherent in sovereignty).

176. *Alton & Sangamon R.R. Co. v. Carpenter*, 14 Ill. 190 (1852) (permitting offset); *McIntire v. State*, 5 Blackf. 384 (Ind. 1840) (permitting offset); *Commonwealth v. Justices of the Sessions*, 9 Mass. 388 (1812) (sustaining a jury verdict of no damages because challenger's property was benefitted by a road erected through it at least as much as the harm it caused); *Symonds v. Cincinnati*, 14 Ohio 147 (1846) (permitting offset); *JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 190–93* (2001) (collecting other cases). *But see Jacob v. City of Louisville*, 39 Ky. 114 (1839) (denying offset); *Woodfolk v. Nashville & Chattanooga R.R. Co.*, 32 Tenn. 422 (1852) (same).

177. *Shepardson v. Milwaukee & Beloit R.R. Co.*, 6 Wis. 605 (1857) (stating that eminent domain power must be asserted and compensation paid upon initial assertion and not after construction of a railroad line is completed); *accord Carson v. Coleman*, 11 N.J. Eq. 106 (1856);

An 1802 Pennsylvania decision denied a landowner compensation from a private chartered turnpike company, which had been authorized to build a toll road from Philadelphia to Lancaster and given eminent domain power.<sup>178</sup> The landowner argued that the Pennsylvania Constitution's Takings Clause required compensation to be paid, but the court cited the six-percent excess rule and limited compensation to the value of improvements.<sup>179</sup> It also rejected the landowner's objection that the turnpike company was unjustly enriched because it was able to charge tolls for those using the road but was not required to compensate landowners for their loss. A Louisiana decision from 1816, four years after it became a state, held that the Fifth Amendment of the United States Constitution did not apply to Louisiana and that no state law required compensation when the government widened a canal, taking some of the plaintiff's property.<sup>180</sup> Other courts interpreted their state constitutions to require that assertions of eminent domain be subject to the "law of the land." Initially some courts held that the mere existence of a statute authorizing the taking satisfied this requirement, even without provision for compensation.<sup>181</sup> In the 1830s, however, courts increasingly began holding that "law of the land" implied a compensation requirement.<sup>182</sup>

As in the Pennsylvania turnpike case, most state courts held throughout the period that a taking could be for a "public" use even though the condemnor was privately owned. A significant debate developed, however, over the range of uses that could meet a "public use" requirement. Turnpikes, canals, and later railroads were typically common carriers, open to everyone, and their development was regarded as a quasi-state function, satisfying any

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Goodall v. City of Milwaukee, 5 Wis. 32, 54 (1856) ("Compensation must precede entry and permanent occupation, or a safe and adequate fund be provided."). Some courts also recognized and enforced legislative provisions to the effect that if railroad construction enhanced the value of the land owner's remaining land this enhanced value should be an offset against the compensation award.

178. *McClenahan*, 6 Binn. at 509, 513.

179. *Id.* at 511–12 ("The validity of the act is impeached by its being repugnant to the constitution of Pennsylvania, which directs that no man's property shall be taken for public use, without his own consent or that of his legal representatives, nor without compensation.").

180. *Renthorp v. Bourg*, 4 Mart. (o.s.) 97, 130–38 (La. 1816); see also *Lindsay*, 2 S.C.L. 38. A few courts disagreed, at least for outright expropriation. See *Gardner v. Trs. of Newburgh*, 2 Johns Ch. 162 (N.Y. Ch. 1816) (requiring compensation for diversion of stream that had run through the plaintiff's land for a long time).

181. *Patrick v. Comm'rs of Cross Roads*, 15 S.C.L. (4 McCord) 541 (1828) (holding that a statute permitting road takings without compensation satisfied the "law of the land" requirement).

182. See *Young v. McKenzie*, 3 Ga. 31, 44 (1847) (requiring compensation under the state constitution "law of the land" requirement); see also *Ex Parte Martin*, 13 Ark. 198 (1853) (requiring compensation under the "law of the land" requirement in the state constitution's preamble); *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451, 460 (1837) (holding that a provision in the North Carolina Constitution requiring that one could not be deprived of property except by "the law of the land" implied a just compensation requirement).

public use requirement.<sup>183</sup> By contrast, taking for purely private roads were viewed much more harshly.<sup>184</sup>

The mill-dam acts, which originated in the colonies in the early 18th century and continued to be enacted during the early national period, went further. They extended a quasi-*eminent domain* power to takers who were not common carriers or transportation utilities. Under them, a land owner could build a dam for water power that flooded upstream land, provided that compensation was paid to the injured property owners.<sup>185</sup> Further, those building the mills did not ordinarily have their prices regulated, nor did they operate under the universal service obligations imposed on common carriers. For example, the Commonwealth of Massachusetts applied its statute in favor of textile mills for purely private manufacturing in order to promote “labour saving machines.”<sup>186</sup>

By the 1830s, the mill-dam acts occasioned a significant debate between Federalist and Whig interests, who favored their expansive use, and Jacksonians, who opposed them. The core of the dispute concerned whether the mill-dam floodings were for a public use. Traditional “grist” mills, or cereal mills, were used for the grinding of food grains. These mills had traditionally been regarded as enterprises “affected with a public interest,” required to serve all customers, and could be destroyed only upon payment

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183. See, e.g., *Whiteman v. Wilmington & Susquehanna R.R. Co.*, 2 Del. (2 Harr.) 514 (1839); *Tide Water Canal Co. v. Archer*, 9 G. & J. 479 (Md. 1839); *Raleigh & Gaston R.R. Co.*, 19 N.C. 451; *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9 (N.Y. Cor. Er. 1837); *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45 (N.Y. Ch. 1831); see also *Brown v. Beatty*, 34 Miss. 227 (1857) (finding evidence of injury caused by the railroad’s trespasses outside of the right of way and remanding for trial on those damages); cf. *Woods v. Nashua Mfg. Co.*, 5 N.H. 467 (1831) (finding the owner of land subjected to a canal right of way entitled to compensation but that the canal company was entitled to pay as a lump sum rather than stretched out to reflect possibly subsequent injuries); *Tuckahoe Canal Co. v. Tuckahoe & James River R.R. Co.*, 38 Va. 42 (1840) (following the federal rule in the *Charles River Bridge* case that a monopoly provision in a grant to a canal would not be implied, but must be explicit, but then holding that when a subsequent railroad right of way interfered with the canal, the latter was entitled to judicially measured compensation).

184. *Roberts v. Williams*, 15 Ark. 43 (1854) (finding a taking for a purely private road unlawful); *Brewer v. Bowman*, 9 Ga. 37 (1850) (similar); *Dickey v. Tennison*, 27 Mo. 373 (1858) (holding that condemnation for a purely private road did not satisfy state constitution’s “public use” requirement); *Taylor v. Porter & Ford*, 4 Hill 140 (N.Y. Sup. Ct. 1843) (similar); *In re Albany St.*, 11 Wend. 149 (N.Y. Sup. Ct. 1834) (taking of more land than required for a street did not meet state constitution’s authorization of condemnation for a public use); *Clack v. White*, 32 Tenn. 540 (1852) (striking down a legislative attempt to broaden the common law doctrine of easement by necessity so as to enable one person to obtain a road over neighboring land upon a showing of convenience). But see *In re Hickman*, 4 Del. 580 (1847) (upholding a statute authorizing the taking for a private road after noting that it also required compensation).

185. See, e.g., *Commonwealth v. Ellis*, 11 Mass. 462, 462 (Mass. 1814); *Stowell v. Flag*, 11 Mass. 364, 364 (Mass. 1814); *Town of Lebanon v. Olcott*, 1 N.H. 339, 342 (N.H. 1818). See generally Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 3 J. ECON. HIST. 232 (1973).

186. See HANDLIN & HANDLIN, *supra* note 57, at 127 (quoting Acting Governor Lincoln).

of compensation.<sup>187</sup> Further, their prices could be regulated.<sup>188</sup> By contrast, saw mills, paper mills, and textile manufacturers, which also ran on water power, were ordinary businesses that operated under common law rules entitling them to deal or not at their volition.<sup>189</sup> In the 1830s, courts began to hold that state statutes authorizing the flooding of land for creating a grist mill for food could not be applied to the creation of a saw mill or paper mill, because the latter were not of a public character.<sup>190</sup> An 1858 Alabama decision struck down for lack of public use a mill-dam statute purporting to cover all types of mills.<sup>191</sup> In 1860, the Supreme Court of Wisconsin considered a mill-dam act that had been previously enacted and upheld by the state supreme court, repealed, and then reenacted. The court acknowledged that if it had to decide the issue, anew it would rule the statute unconstitutional. However, there had been so much investment in reliance on the provision, as well as the judicial decision upholding it, that it was unwilling to cause such a costly dislocation.<sup>192</sup>

Post-Civil War decisions commonly struck the statutes down. In *Ryerson v. Brown*, Justice Cooley wrote the opinion striking down a Michigan statute that authorized the developers of dams to flood upstream property.<sup>193</sup> The statute was not limited to grist mills, which Cooley acknowledged might be considered matters of “necessity.”<sup>194</sup> After summarizing cases from many states, he concluded that unsubsidized private competition should yield sufficient dams:

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187. HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860, at 95 (Clive Day ed., Lawbook Exch. 2d prtg. 2006) (1938); see, e.g., *Sadler v. Langham*, 34 Ala. 311, 336 (1859) (relying on state statute declaring grist mills to be “public mills”); *State v. Edwards*, 29 A. 947, 949 (Me. 1893) (holding that a mill is a “public mill, and rightfully within legislative control”); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245 (1828) (holding that a statute requiring erection of costly locks on a grist mill required compensation); see also *State v. Glen*, 52 N.C. 321 (1859) (requiring compensation when a dam apparently used to drive both a grist mill and a saw mill was forced to make costly alterations in order to permit fish to pass over it).

188. FARNAM, *supra* note 187, at 94–98.

189. Some sawmills may also have been classified as public utilities during and prior to the Revolution. See JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES § 165, § 179 (1888).

190. *Harding v. Goodlett*, 11 Tenn. (3 Yer.) 41, 53 (1832).

191. *Sadler*, 34 Ala. at 333–35; cf. *Traver v. Merrick Cty.*, 15 N.W. 690, 693 (Neb. 1883).

192. *Fisher v. Horicon Iron & Mfg. Co.*, 10 Wis. 351, 352–54 (1860). More of the legislative wrangling is recounted in *Stephens v. Marshall*, 3 Pin. 203 (Wis. 1851); and *Newcomb v. Smith*, 2 Pin. 131 (Wis. 1849). The Wisconsin Supreme Court had held six years earlier that upstream flooding by the construction of a mill required compensation. *Thien v. Voegtlander*, 3 Wis. 461 (1854); see also *Jordan v. Woodward*, 40 Me. 317, 324 (1855) (upholding mill dam act only because of “long acquiescence of our citizens in its provisions,” making it “the settled law of the State”).

193. *Ryerson v. Brown*, 35 Mich. 333 (1877).

194. *Id.* at 338.

In this state it is doubtful if such legislation would add at all to the aggregate of property. Numerous fine mill-sites in the populous counties of the state still remain unimproved, not because of any difficulty in obtaining the necessary permission to flow, but because the power is not in demand. If the power were needed, the land would generally be obtained on reasonable terms, except, perhaps, where there was ground to believe a dam would become a nuisance; and in such cases no permission to take lands, and no condemnation for mill purposes, could protect the parties maintaining a dam against prosecution for the public grievance.<sup>195</sup>

Cooley's discussion introduced what became a recurring theme in the debate over the appropriate scope of the eminent domain power. The classical position was that eminent domain should be used only in the event of a market failure that entitles the sovereign to force a transaction that would not ordinarily be made. The most common failure is "holdout" problems that occur when a landowner can insist on an above-market price simply because there are no good alternatives to the condemner's use of his property. But if the market is competitive, as Cooley pointed out, and offers ample alternatives, then the power is unnecessary and its exercise cannot be for a public use.

Cooley also suggested that the traditional rule that grist mills are public utilities should be re-examined in light of the railroad, which permitted grains to be transported for long distances, and also of steam engines, which were powering a growing percentage of mills but did not require a dam.<sup>196</sup> In any event, using eminent domain to justify flooding in order to create mills required

the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations. A flouring mill in this state may grind exclusively the wheat of Wisconsin, and sell the product exclusively in Europe; and it is manifest that in such a case the proprietor can have no valid claim to the interposition of the law to compel his neighbor to sell a business site to him . . .<sup>197</sup>

Writing in the late 1880s, John Lewis concluded in his treatise on eminent domain that the term "public use" meant that takings by private parties were permissible only if the taker intended to use them for a public utility or similar firm with a universal service obligation. For example, while a taking for a toll road open to everyone might be permitted, a taking for a private road from which the taker "may lawfully exclude the public . . . is

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195. *Id.* at 337-38.

196. *Id.* at 338-40.

197. *Id.* at 338.

void.”<sup>198</sup> Lewis quoted at length from an 1868 Iowa Supreme Court decision written by Justice John F. Dillon.<sup>199</sup> The decision held that the exercise of eminent domain power for the creation of a purely private road was void under that state’s constitution.<sup>200</sup>

## 2. Inverse Condemnation

“Inverse” condemnation refers to challenges when the government does not acknowledge a taking but nevertheless does something the landowner claims to be a taking in fact. The Fifth Amendment Eminent Domain Clause and, historically, the equivalent clauses in state constitutions provided compensation only for a “taking,” which was historically interpreted to refer to outright expropriation. By contrast, the law of trespass required an unauthorized intrusion that actually crossed the owner’s boundary line, such as an easement or flooding. For example, *Pumpelly v. Green Bay Co.*, a diversity case in which the Supreme Court applied the Wisconsin Constitution, found a taking when a state statute authorized a corporation to build a dam that flooded the plaintiff’s property without clearly providing for compensation.<sup>201</sup>

The government had never asserted the eminent domain power in *Pumpelly*, however. An increasing number of courts by this time were allowing common-law trespass damages for the “consequential” harms of government development activity.<sup>202</sup> *Pumpelly*’s action had been brought in “trespass on the case,” which was a common law form used for “indirect” injuries that might or might not involve a physical trespass. Through the novel combination of a tort writ and a state takings clause, plaintiffs were able to avoid the sovereign-immunity defense.<sup>203</sup> Even so, the court had to distinguish several decisions that had found no liability for governmental actors under

198. LEWIS, *supra* note 189, § 167, at 229.

199. *See id.* § 167, at 230–31 (quoting *Bankhead v. Brown*, 25 Iowa 540, 547–48 (1868)).

200. *Bankhead*, 25 Iowa 540; *accord* *Sadler v. Langham*, 34 Ala. 311 (1859); *Nesbitt v. Trumbo*, 39 Ill. 110 (1866).

201. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871). On *Pumpelly*, see EPSTEIN, *supra* note 164, at 38–44.

202. *E.g.* *Hooker v. New Haven & Northampton Co.*, 14 Conn. 146 (1841) (recognizing action in trespass for periodic flooding brought about by canal reconstruction); *Sinnickson v. Johnson*, 17 N.J.L. 129 (1839) (granting damages for consequential damages caused by government-authorized construction of canal in action for trespass on the case); *Pratt v. Brown*, 3 Wis. 603 (1854) (regarding trespass on the case and the Mill-Dam Act, requiring compensation for excessive flooding).

203. *See, e.g.*, *Tinsman v. Belvidere Del. R.R. Co.*, 26 N.J.L. 148 (1857) (discussing trespass on the case for injuries from railroad construction and distinguishing between harms caused by a private railroad corporation, which did not have sovereign immunity, and the government itself); *see also* *McCarthy v. City of Minneapolis*, 281 N.W. 759 (1938) (recounting history indicating that Minnesota “taking or damaging” provision did not create a new cause of action but rather served to remove the sovereign immunity defense).

similar facts.<sup>204</sup> The Supreme Court concluded that, to the extent the statute did not require compensation, it violated the 1848 Wisconsin Constitution, whose takings language roughly tracked that of the federal Fifth Amendment.<sup>205</sup>

After the Civil War, claims against the government soared, reflecting much more classical concerns about the private costs of government-supported economic development. *Pumpelly* had involved flooding of the plaintiff's land, which would have been an unlawful trespass in any event. About the same time as *Pumpelly*, several states replaced their constitutions or enacted amendments requiring compensation if property was either taken or "damaged." Illinois went first, including a "damaging" provision in its new constitution of 1870.<sup>206</sup> It was responding to landowner complaints of eminent domain power run amok, particularly as exercised by railroads. Eminent domain treatise writer John Lewis observed in 1888 that every state that revised its constitution after 1870, except North Carolina, included such a provision.<sup>207</sup> By 1880, 11 states had made this change, and by 1912, half of the states had done so. All but one of the states readmitted to the union after 1870 included a "taking or damaging" constitutional provision.<sup>208</sup> The Federal Constitution was never amended.

Since there was so little history requiring assertion of the eminent domain power for mere market damage, the new provisions greatly increased the number of "inverse" claims, generally brought as common law actions in trespass or trespass on the case.<sup>209</sup> The Illinois Supreme Court recognized such a claim in 1873, shortly after its state constitution was amended, when a municipal railroad's excavations limited access to the plaintiff's lot.<sup>210</sup> The

204. *E.g.*, *Hanson v. City Council*, 18 La. 295 (1841) (denying action involving destruction of private buildings for road construction); *Canal Appraisers of New York v. People ex rel. Tibbits*, 17 Wend. 571 (N.Y. 1836) (granting no compensation where river improvements made the plaintiff's mill worthless); *Alexander v. City of Milwaukee*, 16 Wis. 247 (1862) (denying action where the city's excavation caused intermittent flooding).

205. *Pumpelly*, 80 U.S. at 166 ("The property of no person shall be taken for public use without just compensation therefor." (quoting WIS. CONST. art. I, § 13 (1848))).

206. *See* ILL. CONST. of 1870, art. II, § 13 ("Private property shall not be taken or damaged for public use without just compensation.").

207. LEWIS, *supra* note 189, § 222, at 296.

208. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 119–25 (1999). The states that included this provision were "Colorado (1876), Montana (1889), North Dakota (1889), South Dakota (1889), Washington (1889), Wyoming (1890), Utah (1896), Oklahoma (1907), Arizona (1912), New Mexico (1912), Alaska (1959), and Hawaii (1959)." *Id.* at 120 n.272. The only state not to include such a provision was Idaho, admitted in 1890. *See id.*

209. *See* LEWIS, *supra* note 189, §§ 222–31, at 296–312.

210. *City of Pekin v. Brereton*, 67 Ill. 477 (1873) (involving excavation adjacent to plaintiff's land that obstructed sidewalks and roads). Prior to the Civil War and before the "damaging" provisions, courts consistently denied claims for nontrespassory and purely consequential damages. *See, e.g.*, *New Albany & Salem R.R. Co. v. O'Daily*, 12 Ind. 551 (1859); *Chapman v.*

court observed that prior to 1870, when the Illinois Constitution was amended to include the “damaging” provision, such actions were regularly disallowed.<sup>211</sup> An 1881 Illinois Supreme Court decision found an unconstitutional “damaging” when the city of Chicago built a viaduct that limited a property owner’s access to heavily travelled Halsted Street.<sup>212</sup> No portion of the plaintiff’s land bordered on Halsted Street and the construction did not encroach on his boundary lines, so there was no trespass.<sup>213</sup> His claim was simply that his property was less valuable because the construction raised the street and occupants of his rental property could now access it only by climbing steps.<sup>214</sup> Because the city had never asserted its eminent domain authority against him, the land owner brought a common law action for trespass on the case for an “indirect” harm.<sup>215</sup> The trial court had rejected the land owner’s proposed jury instruction that permitted liability if the “plaintiff’s said premises were permanently damaged and depreciated in value by reason of being deprived of such access.”<sup>216</sup> Rather, the court gave a traditional instruction that permitted liability only for actual expropriation or physical trespass.<sup>217</sup> The Illinois Supreme Court reversed, noting that Illinois’ previous 1848 Constitution had applied “only to cases of an actual appropriation of private property by the State,” but the “damaging” provision had been intended to go further.<sup>218</sup> At the same time, however, the court observed that many things a municipality does, such as relocating a jail, might have an adverse effect on nearby property values.<sup>219</sup> While it could not permit damages in all such cases, the present one involved a limitation on access.<sup>220</sup>

As John Lewis assessed the new constitutional provisions, the right to damages under them could not “be reduced to a question of distance, but depend[ed] upon the fact of the market value of the premises being actually depreciated by reason of the obstruction or improvement.”<sup>221</sup> Lewis acknowledged that such claims could run to very large amounts. Nevertheless, speaking of the aggregate injuries of affected land owners: “[W]hy is not that part of the cost of the improvement; and, if taken into account as such, why

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Albany & Schenectady R.R. Co., 10 Barb. 360 (N.Y. Gen. Term 1851); *Drake v. Hudson River R.R. Co.*, 7 Barb. 508 (N.Y. Gen. Term 1849).

211. See *id.* at 480–81 (citing *Murphy v. City of Chicago*, 29 Ill. 279 (1861); *Moses v. Pittsburgh, Fort Wayne & Chi. R.R. Co.*, 21 Ill. 516 (1859)).

212. *Rigney v. City of Chicago*, 102 Ill. 64 (1881).

213. *Id.* at 69, 76.

214. *Id.* at 69–70.

215. *Id.* at 70–71.

216. *Id.* at 69.

217. *Id.* at 69–70.

218. *Id.* at 71.

219. *Id.* at 80–81.

220. *Id.* at 80.

221. LEWIS, *supra* note 189, § 227, at 308.



should not the loser of it receive it?"<sup>222</sup> That was about the purest statement of classical liberal economics ever given by a 19th-century property lawyer.

Even during the height of economic substantive due process, the Supreme Court never applied takings law with the same aggressiveness as it did liberty-of-contract doctrine. This was true even though the Federal Takings Clause was far more explicit than anything the Court relied on to support liberty of contract generally. Most particularly, in *Euclid v. Ambler Realty*, Justice Sutherland wrote the Court's 5-4 decision upholding a comprehensive zoning provision, notwithstanding evidence that the negative impact on the plaintiff's property values was severe.<sup>223</sup> The courts required a far lesser showing in order to sustain substantive due process challenges to protective labor wage and hour statutes, occupational licensing provisions, or even some health regulations.<sup>224</sup> Three years earlier, Sutherland himself had written the majority opinion striking down a minimum wage statute applied to women workers in Washington, D.C.<sup>225</sup>

#### IV. THE SOCIAL CONTRACT

Both proponents and critics of the classical Constitution have considered that it somehow embodies a social contract or "compact," based on a presumption of unanimous consent at some *a priori* point.<sup>226</sup> Citizens consent to be governed by legislation that is almost always non-unanimous. As a result, this legislation must be tested against social-contract principles, considering what those forming the social contract would have wanted, and what they were willing to give up in order to have it.

Both sides have significantly exaggerated the role of the social contract in American constitutional thought. Historically, when courts used the term, they were either referring to a specific text, such as a federal or state constitution, or else the statement was made as dicta, but nothing more. Even during the liberty-of-contract era, judges rarely used the idea of the social contract, even as background, for constitutional interpretation.

The idea of fundamental law based on an implied social contract has captured people of very different ideologies, from Richard Epstein, or

222. *Id.* at 309.

223. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (noting plaintiff's claim that land had been worth \$10,000 per acre prior to the zoning ordinance's enactment but was subsequently worth only \$2500 per acre); *see also* HOVENKAMP, *supra* note 6, at 130-31.

224. *See* HOVENKAMP, *supra* note 6, at 243-48, 263-66.

225. *See generally* *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

226. *See, e.g.*, EPSTEIN, *supra* note 3, at 20; *see also* VIII FISS, *supra* note 21, at 49, 82; ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 131-32, 183-89 (1974); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 142-50 (1981); Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 250-54 (1914). For a good overview, *see generally* RON REPLOGLE, *RECOVERING THE SOCIAL CONTRACT* (1989). *See also* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 530 (1997).

Buchanan and Tullock on one side, to John Rawls on the other.<sup>227</sup> Therein lies one of its biggest problems. As a principle of social ordering it is frustratingly indeterminate because of its sensitivity to assumptions about who the imagined original parties to this contract were and what they valued. Did each person set out to protect only her own interest, or were they outwardly regarding for the welfare of others?<sup>228</sup> Did their theory of value depend on past investment or on rational expectations about the future? Relatedly, did they know about their future stations in life, or were they acting behind a “veil of ignorance?”<sup>229</sup> Only the assumption of at least a limited veil of ignorance is consistent with a marginalist theory of rational expectations. An assumption of full knowledge about future status eliminates risk from the calculus and as a result has no relevance to the world we actually live in.

Whoever the parties to the *classical* social contract were, they could not possibly have been marginalists. Marginalist theories of value, which are characteristic of economics since the late 19th century, are driven by expectations concerning the future. As a result, risk always enters the calculus. Even a completely self-interested marginalist would maximize *expected* individual value by maximizing aggregate value. For example, if economic development of a certain type promised increased social value while reducing the value of some individual property rights, the self-interested marginalist would favor development. On average, she would come out a winner. A marginalist would maximize the individual value of property rights by considering expected utility and risk. She would participate in economic development, or even social insurance schemes, if the expected value was greater than costs. Indeed, depending on the participant’s degree of risk aversion, she might participate in programs whose aggregate costs were greater than benefits when not adjusted for risk. For example, even if the provision of universal health insurance produced a deadweight loss of ten percent from administrative costs, she would participate if she were adverse to the risk of catastrophic loss that might be caused by a large, uninsured medical event. She would also agree to government intervention to correct market failures if she believed that the incremental value produced by the correction exceeded its incremental cost. As a result she would agree to cost-benefit analysis of regulatory provisions. Consistent with that, she would agree to at least certain forms of land-use regulation, safety regulation, or regulation

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227. See, e.g., BUCHANAN & TULLOCK, *supra* note 1; EPSTEIN, *supra* note 3; JOHN RAWLS, A THEORY OF JUSTICE 19 (1971); see also BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10 (1980).

228. As an example of the latter, JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 26–28 (Charles Frankel ed., 1947) (1762); cf. RAWLS, *supra* note 227, at 75 (assuming self interest).

229. See, e.g., BUCHANAN & TULLOCK, *supra* note 1, at 4 (assuming full information about future status); VIII FISS, *supra* note 21, at 82 (noting that the social-contract theory of the *Lochner* Era assumed that people knew about their individual wealth and status prior to formation). *Contra* RAWLS, *supra* note 227, at 36–37 (assuming a “veil of ignorance”).

of pure foods and drugs or financial institutions. Further, even if the original contracting parties knew about their *initial* position, they would act to minimize risk for the uncertain future, and those with more to lose might be more risk averse.<sup>230</sup>

The original contracting parties would also have to consider tradeoffs between shorter-run investments and longer-run payoffs, and that leads to another important assumption. Would the participants in the social contract want to maximize everything for their own immediate generation, not caring about what was left for the next and subsequent generations, or would they prefer to maximize value over the longer run, delaying short-run value for the sake of descendants? The most significant implication of marginalist thinking is that values are based on expectations about the future, and “expectations” can refer to shorter or longer time horizons. As a result the “social contract” shatters into different and conflicting ideas about the State, depending on what people value, their degree of risk aversion or concern about the future.<sup>231</sup> Depending on assumptions, social-contract theory can get you either the libertarian state or the socialist state.

In any event, the social contract also fares poorly in the historical literature of United States constitutionalism. A few writers have seen the development of classical constitutional theory in the 19th century as reflecting a strong conception of a social contract.<sup>232</sup> Support is minimal, however. The Framers of the Constitution clearly grasped the idea of a social contract, or compact, although their thought was influenced at least as much by heavily contractual Christian doctrine, with its theology of the covenant.<sup>233</sup> Further, with few exceptions, the Founders thought of the social contract as a set of authoritative texts or “compacts” to which the members of society had given some kind of consent.<sup>234</sup> That is, the term “social compact” almost always

230. See, e.g., Daniel Paravisini et al., *Risk Aversion and Wealth: Evidence from Person-to-Person Lending Portfolios* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 16063, 2010), <http://www.nber.org/papers/w16063.pdf>.

231. HOVENKAMP, *supra* note 6, at 25–35.

232. On the earlier period, see generally EPSTEIN, *supra* note 3. On the Gilded Age and Progressive Era, see generally VIII FISS, *supra* note 21.

233. See, e.g., BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 58–60 (1967); JOHN F. FENTON, THE THEORY OF THE SOCIAL COMPACT AND ITS INFLUENCE UPON THE AMERICAN REVOLUTION (1891); JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 170–76 (1943); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 282–90 (1969); Andrew C. McLaughlin, *Social Compact and Constitutional Construction*, 5 AM. HIST. REV. 467, 469 (1900); Thad W. Tate, *The Social Contract in America, 1774–1787: Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 375, 376 (1965). On the qualifier that republican virtues and Christianity counted as well, see STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 5–7 (1990); GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 230–40 (1978); Hovenkamp, *supra* note 122, at 2316–17; James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9, 9–33 (1987).

234. See *infra* text accompanying notes 245–53.

referred to an actual enacted or ratified *text*. There is no evidence that any significant group of participants in the making of the Constitution intended for judges to be able to reach beyond the text to a background social-contract principle of constitutional decision making.

By contrast, the social contract in the Lockean theory of classical statecraft is not a single document or written compact, or even an historical event in time. Rather, it is a hypothesized *a priori* bargaining position from which government emerges. Blackstone, whose *Commentaries* slightly preceded the Constitution's formation and quickly became the most important legal treatise in the United States, clearly understood the concept of an original social contract. He also understood that it was a conceptual reconstruction rather than an historical event or document.<sup>235</sup> In Book I of the *Commentaries*, Blackstone speculated that there might have been some historical "unconnected state of nature" from which people merged "together in a large plain" and "entered into an original contract" to chose "the tallest man present to be their governor."<sup>236</sup>

Blackstone almost immediately concluded, however, that "[t]his notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted." Further, "it is plainly contradictory to the revealed accounts of the primitive origins of mankind," which he described as gradually evolving from families to clans. Nevertheless, he concluded, although there was no such historical compact in fact, the conception of it for the purpose of mutual protection is valuable:

And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, on other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community . . .<sup>237</sup>

The social contract from Locke through Blackstone was distinctively "pre-classical." Indeed, one important characteristic of the British classical political economists is the extent to which they either rejected or ignored social-

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235. 1 BLACKSTONE, *supra* note 8, at \*121-46.

236. *Id.* at \*47. Quotations are from the first full edition of Blackstone published in the United States, edited by St. George Tucker, a professor at the College of William and Mary and a Virginia judge. BLACKSTONES'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., 1803).

237. 1 BLACKSTONE, *supra* note 8, at \*47.

contract theory.<sup>238</sup> Adam Smith, whose *Wealth of Nations* (1776) came to represent the economic ideology of the classical Constitution in the mid-19th century, dismissed the social contract and the idea of an early state of nature as meaningless fiction. For him, political development was largely a product of gradually evolving norms. The “invisible hand” that enabled the economy and the State to function was hardly the product of a historical social compact, and Smith’s *Lectures on Justice* (1763) rejected it as the *raison d’être* of civil government. Neither *The Wealth of Nations* (1776) nor *The Theory of Moral Sentiments* (1759) ever mentions the subject.<sup>239</sup> Smith’s British followers, including Malthus, Ricardo, and Mill, all defended economic nonintervention strongly, but uniformly ignored or dismissed the idea of a social contract as the basis for their beliefs.<sup>240</sup> John Stuart Mill’s *Political Economy* included a lengthy argument for *laissez faire* economic principles, but the social contract never appeared among his defenses.<sup>241</sup> He rejected the idea in his essays on utilitarianism and liberty.<sup>242</sup> The 19th-century American political economists very largely did the same thing—defending *laissez faire* economic doctrine vigorously, but giving little thought to a social contract as the justification.<sup>243</sup> This was true even of Jacksonian political economists such as Henry Vethake.<sup>244</sup>

238. Hovenkamp, *Cultural Crises*, *supra* note 125, at 2316–17. For example, Thomas Sowell’s masterful study completely ignores the subject. *See generally* THOMAS SOWELL, *ON CLASSICAL ECONOMICS* (2006).

239. ADAM SMITH, *LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS* 11–15 (Edwin Cannan ed., 1896) (1763). *See generally* SMITH, *supra* note 9; ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (6th ed. 1790).

240. *See generally* THOMAS ROBERT MALTHUS, *PRINCIPLES OF POLITICAL ECONOMY* (W. Pickering ed., 2d ed. 1836) (1820); DAVID RICARDO, 1 *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION*, *reprinted in* 1 *THE WORKS AND CORRESPONDENCE OF DAVID RICARDO* 1 (Piero Sraffa ed., 1951) (1817).

241. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 941–79 (W.J. Ashley ed., Longmans, Green and Co. 7th ed. 1909) (1848).

242. JOHN STUART MILL, *UTILITARIANISM* 82 (1861) (“[A] favourite contrivance has been the fiction of a contract, whereby at some unknown period all the members of society engaged to obey the laws, and consented to be punished for any disobedience to them . . .”). Mill also rejected social-contract theory in his essay *On Liberty*. JOHN STUART MILL, *ON LIBERTY* 140–76 (1869).

243. *See e.g.*, H.C. CAREY, *PRINCIPLES OF POLITICAL ECONOMY* (1837); H.C. CAREY, *PRINCIPLES OF SOCIAL SCIENCE* (1858); *see also* THOMAS COOPER, *LECTURES ON THE ELEMENTS OF POLITICAL ECONOMY* (1826); FRANCIS WAYLAND, *THE ELEMENTS OF POLITICAL ECONOMY* (1837). Wayland’s *Elements of Moral Science* contains a brief discussion, apparently referring to positive law. FRANCIS WAYLAND, *THE ELEMENTS OF MORAL SCIENCE* 401–09 (1835). Other 19th-century American economists also ignored the social-contract or contractarian theories of government. *See, e.g.*, SAMUEL P. NEWMAN, *ELEMENTS OF POLITICAL ECONOMY* (1835); WILLARD PHILLIPS, *A MANUAL OF POLITICAL ECONOMY, WITH PARTICULAR REFERENCE TO THE INSTITUTIONS, RESOURCES, AND CONDITION OF THE UNITED STATES* (1828); AMASA WALKER, *THE SCIENCE OF WEALTH: A MANUAL OF POLITICAL ECONOMY: EMBRACING THE LAWS OF TRADE, CURRENCY, AND FINANCE* (1866).

244. *See generally* HENRY VETHAKE, *THE PRINCIPLES OF POLITICAL ECONOMY* (1838).

While political leaders and courts at the time of the Constitution's creation sometimes spoke of a "social compact" or "social contract" as fundamental law, they used these terms in reference to the *text* of either the U.S. or a state constitution, or occasionally to a treaty or inter-state agreement. John Adams spoke of his 1780 draft of the Massachusetts Constitution as "a social compact, by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good."<sup>245</sup> A 1781 Pennsylvania Supreme Court decision spoke in similar terms, referring to the text of the Articles of Confederation.<sup>246</sup> In 1782, Virginia's highest court declared about its state constitution, "since we have a written record of that which the citizens of this state have adopted as their social compact[,] and beyond which we need not extend our researches."<sup>247</sup> The social compact *was* the text, and one need not look further. Some delegates, including James Wilson of Pennsylvania as well as Madison, used a social-contract analogy at the constitutional convention, arguing that the states were the equivalent to individuals in a state of nature, and that the constitutional text would be their social contract.<sup>248</sup> Alexander Hamilton complained in *Federalist No. 21* of the lack of sanctions in the "social compact," referring to the Articles of Confederation then in force.<sup>249</sup> In *Federalist No. 44*, by contrast, James Madison did speak of excessive state power to declare legal tender or issue paper currency or make ex post facto laws to be "contrary to the first principles of the social compact and to every principle of sound legislation."<sup>250</sup> For that reason the proposed Constitution took these powers away from the states. By contrast, "Brutus," widely believed to be New York Judge and constitutional opponent Robert Yates, wrote in the *Antifederalist* that the proposed Constitution was deficient because "[t]he

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245. 8 PAPERS OF JOHN ADAMS 237 (Gregg L. Lint et al. eds., 1989).

246. *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53, 54–55 (Pa. 1781). The decision was reported in U.S. Reports because Alexander Dallas, the first Supreme Court reporter, grouped Pennsylvania and U.S. decisions together in the first volume.

247. *Commonwealth v. Caton*, 4 Call 5, 7 (Va. 1782) (Pendleton, C.J.); *see also* *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795) ("The preservation of property then is a primary object of the social compact, and, by the late Constitution of Pennsylvania, was made a fundamental law."); *Ex parte Martin*, 13 Ark. 198, 207 (1853) (speaking of the Arkansas Constitution as a "social compact"); *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 57 (Va. 1793) (Tyler, J.) (speaking of the period immediately after the Declaration of Independence as prior to the existence of any "social compact," which awaited the formation of either the Articles of Confederation or the Constitution).

248. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 90, 97–98 (Adrienne Koch ed., 1966); *see also* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 315 (Max Farrand ed., 1911) (Madison, likening social contract to the Constitution's agreement among the states). This position provoked a famous speech from Daniel Webster in 1833. DANIEL WEBSTER, THE CONSTITUTION NOT A COMPACT BETWEEN SOVEREIGN STATES (1833).

249. THE FEDERALIST NO. 21, at 101 (Alexander Hamilton, Dec. 12, 1787) (Oxford Univ. Press 2008).

250. THE FEDERALIST NO. 44, at 223 (James Madison, Jan. 25, 1788) (Oxford Univ. Press 2008).

principles . . . upon which the social compact is founded, ought to have been clearly and precisely stated, . . . [b]ut on this subject there is almost an entire silence.”<sup>251</sup>

As John Jay, first Chief Justice of the United States Supreme Court, put it in *Chisholm v. Georgia*:

Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner. By this great compact however, many prerogatives were transferred to the national Government, such as those of making war and peace, contracting alliances, coining money, etc. etc.<sup>252</sup>

The Court later concluded that treaties are also “compacts.”<sup>253</sup> In sum, although these judges and other writers spoke of a social contract or compact, it was nearly always in relation to the text of the federal Constitution, state constitutions, or some other authoritative document. There was little support for the view that once the Constitution was ratified a social contract consisting of principles not articulated in any text should remain in force.

The closest the early United States Supreme Court ever came to recognizing a social contract apart from the text was Justice Samuel Chase’s brief discussion in *Calder v. Bull*. Chase suggested that a state legislature lacked the authority to alter fundamental rights even though “its authority should not be expressly restrained by the Constitution, or fundamental law, of the State.”<sup>254</sup> Rather, “[t]he purposes for which men enter into society will determine the nature and terms of the social compact . . . .”<sup>255</sup> This prompted a debate with Justice James Iredell who, while concurring in the judgment, rejected Chase’s broad fundamental-rights perspective, concluding that natural-law principles apart from the constitutional text would apply “no fixed standard” because “the ablest and the purest men have differed upon the subject.”<sup>256</sup>

In *Corfield v. Coryell*, Justice Bushrod Washington, then riding as a circuit judge, concluded that the highly general language of the Article IV Privileges and Immunities Clause, which had been borrowed from the Articles of

251. “BRUTUS,” THE ANTIFEDERALIST NO. 2 (Nov. 1, 1787). Yates had also been a delegate to the Constitutional Convention from New York.

252. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793).

253. *Id.* at 475; see also *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823) (repeatedly using the term “compact” to describe the agreement by which Kentucky was severed from Virginia).

254. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

255. *Id.*

256. *Id.* at 399. For thoughtful discussion, see DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 101–03 (2005).

Confederation;<sup>257</sup> implied a set of specific rights.<sup>258</sup> Justice Washington never referred to a social contract or compact, however. Rather, the idea was that the *text* of the Constitution recognized these rights, although the term “privileges and immunities” had to be interpreted.

The idea that the highly general language of either the Article IV or, later, the Fourteenth Amendment’s Privileges or Immunities Clause, actually embodied a list of unarticulated social-contract principles obtained a small amount of traction in the mid-19th century. It never claimed a majority position in even a single Supreme Court decision, however. A half century after *Corfield*, Justice Noah Haynes Swayne invoked the social contract in his dissent in the *Slaughter-House Cases*.<sup>259</sup> The majority had refused to apply the recently ratified Fourteenth Amendment’s Privileges or Immunities Clause<sup>260</sup> to invalidate a New Orleans monopoly given to a slaughterhouse. Swayne’s argument was that the general term “privileges and immunities” included a list of unenumerated rights contained in a social contract, and among these was the right to pursue a lawful occupation free of monopoly. According to Justice Swayne these rights accorded with “the plainest considerations of

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257. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); cf. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1 (“[T]he free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States.”).

258. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

*Id.*

259. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

260. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).



reason and justice” and “the fundamental principles of the social compact.”<sup>261</sup> While Swayne’s dissent was largely ignored, the two dissenting opinions by Justices Field and Bradley were widely cited as rallying cries for the limitation of state power to interfere in the freedom to pursue a lawful occupation. Neither invoked the social contract.<sup>262</sup> More recent scholarship has reached the same conclusion.<sup>263</sup>

In his *Commentaries* on the Constitution, conservative anti-Jacksonian Joseph Story had acknowledged the theory of a social compact. However, “the doctrine itself requires many limitations and qualifications, when applied to the actual conditions of nations . . . .”<sup>264</sup> For Story the only meaningful definition of a social contract was the federal and various state constitutions ratified in the wake of the American revolution. His position was contained in a chapter entitled “Nature of the Constitution—Whether a Compact.” He concluded that there may have been a social compact that antedated the United States Constitution, but it “existed in a visible form between the citizens of each state in their several constitutions.” As a result, all forms of this compact were “written.”<sup>265</sup> Usage from the middle of the 19th century to the Gilded Age, while economic substantive due process was percolating in the state courts, was similar. For example, in *Dred Scott*, Chief Justice Taney complained that the slave-holding states would never have agreed to the Constitution if they believed it would treat slaves as “citizens.”<sup>266</sup> Of course, he was speaking of the constitutional text. Neither Taney’s opinion for the Court or any of the six concurring opinions or two dissents ever referred to a social contract or compact.

Social-contract language did appear more frequently during the heyday of substantive due process, but always in dicta. Further, the way the concept was used only suggested how indeterminate and unhelpful it was as a rationale for constitutional decision-making. A good illustration is *People v. Budd*, where a divided New York Court of Appeals upheld a statute regulating the prices charged by grain elevators.<sup>267</sup> Justice Andrews spoke for the majority concluding that “the very nature of the social compact” is to recognize

261. *Slaughter-House Cases*, 83 U.S. at 129 (Swayne, J., dissenting).

262. *Id.* at 83 (Field, J., dissenting); *id.* at 111 (Bradley, J., dissenting).

263. See, e.g., KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014) (ignoring the social contract in the common understanding of privileges and immunities both prior to and after the Fourteenth Amendment); accord Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined*, 31 EMORY L.J. 785 (1982).

264. 1 STORY, *supra* note 56, § 327.

265. *Id.* §§ 306–18.

266. *Scott v. Sandford (Dred Scott)*, 60 U.S. 393, 404–05 (1856); see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 355 (1978); cf. *Prigg v. Commonwealth*, 41 U.S. (16 Pet.) 539, 660 (1842) (agreeing that some southern state would have thought slavery to be a part of the social compact).

267. *People v. Budd*, 117 N.Y. 1 (1889).

governmental power “to prescribe regulations demanded by the general welfare for the common protection of all.”<sup>268</sup> By contrast, Justice Gray’s dissent concluded that the regulatory statute “violates the social compact under which we live.”<sup>269</sup>

A year earlier, the United States Supreme Court had upheld a similar law. At one point in his opinion for the Court, Chief Justice Waite used the term “social compact” to describe Acts of Parliament and state constitutions. At another point he quoted the 1780 Massachusetts Constitution as a social compact by which citizens contracted with one another for the “common good.”<sup>270</sup> Justice Harlan quoted the same language in *Jacobson*, 30 years later, when the Court upheld a Massachusetts statute mandating vaccination.<sup>271</sup> In all of these decisions the term “social compact” referred to an enacted text. In *Bertholf v. O’Reilly* the New York Court of Appeals upheld a statute that made a landlord liable for permitting an unlicensed tenant to sell liquor on the property to a man who became intoxicated and then ran over and killed the plaintiff’s horse.<sup>272</sup> Justice Andrews wrote for the unanimous court that

[t]he question whether a statute is a valid exercise of legislative power is to be determined solely by reference to constitutional restraints and prohibitions. The legislative power has no other limitation. . . . The theory that laws may be declared void because deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities.<sup>273</sup>

In sharp contrast, *Loan Ass’n v. Topeka*, discussed previously, held that a tax raised to finance a railroad bridge violated a fundamental right in the “social compact” because the monies were not used for a public purpose.<sup>274</sup> Here, the term was used as a justification for reaching beyond the

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268. *Id.* at 7; *see also* *Losee v. Buchanan*, 51 N.Y. 476, 484 (1873).

By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender by every other man of the same rights, and the security, advantage and protection which the laws give me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state.

*Id.*

269. *Budd*, 117 N.Y. at 34 (Gray, J., dissenting).

270. *Munn v. People*, 94 U.S. 113, 124 (1876).

271. *Jacobson v. Commonwealth*, 197 U.S. 11, 27 (1905).

272. *Bertholf v. O’Reilly*, 74 N.Y. 509 (1878).

273. *Id.* at 514 (emphasis omitted).

274. *Loan Ass’n v. Topeka*, 87 U.S. 655, 663 (1874); *see also supra* text accompanying notes 147–49.

constitutional text, which never limited the state taxing power to public purposes. While the “public purpose” doctrine might be viewed as recognition of a right created by the “social compact” aside from the text, the doctrine was short lived.<sup>275</sup>

Notwithstanding their support for the *Topeka* holding, the constitutional law writers that we today regard as parents of economic substantive due process paid scant attention to the social contract as a basis for their beliefs. Thomas M. Cooley, the principle author of the public purpose doctrine, had almost nothing to say on the subject in *Constitutional Limitations*, other than to observe that courts used it mainly to express a conclusion that they had already drawn from an explicit statement in a state or Federal Constitution.<sup>276</sup> In his *Treatise on Taxation*, he did make a single mention of the “social compact” as a source for the public purpose doctrine.<sup>277</sup> John Dillon never mentioned it at all.<sup>278</sup> Francis Wharton’s *Commentaries on Law* (1884) contained an extensive discussion but ultimately concluded that law was customary, evolving over several centuries, rather than the product of a single social agreement.<sup>279</sup> Wharton’s view reflected the historicist thought of the day, developed particularly in Sir Henry Maine’s *Ancient Law*. Maine rejected the social contract as a basis for society, arguing instead that legal rights and norms had evolved over a long period of social trial and error.<sup>280</sup>

One might expect that Christopher Tiedeman, the most libertarian of the substantive due process writers, would be a strong promoter of the social contract. But he described social-contract theory as “the extreme limits of absurdity.”<sup>281</sup> He drew this conclusion not in his prominent treatise on constitutional regulatory power,<sup>282</sup> but rather in an interesting 1890 monograph entitled *The Unwritten Constitution*, which was an argument against “strict constructionists” who believed that the Constitution could have no meaning other than what was explicitly granted by the text.<sup>283</sup> In his *Police Power* treatise, Tiedeman concluded:

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275. See *supra* text accompanying notes 150–59.

276. COOLEY, *supra* note 124, at 198 n.1; see also *id.* at 47 (using the term to refer to a written declaration of rights).

277. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS 68 (1881).

278. DILLON, *supra* note 124.

279. WHARTON, *supra* note 124, §§ 42–52, 63–64, at 78–86, 101–05 (1884).

280. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS (1861); see also HOVENKAMP, *supra* note 6, at 3–5. On Wharton’s historicism, see DAVID M. RABBAN, LAW’S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 15–23, 325–60 (2013).

281. CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 70 (1890).

282. See generally TIEDEMAN, POLICE POWER, *supra* note 124.

283. TIEDEMAN, *supra* note 281, at 130.

It may now be considered as an established principle of American law that the courts, in the performance of their duty to confine the legislative department within the constitutional limits of its power, cannot nullify and avoid a law, simply because it conflicts with the judicial notions of natural right or morality, or abstract justice.<sup>284</sup>

Tiedeman went on to acknowledge, however, that in cases of constitutional ambiguity due deference should be made to questions of natural liberty. For example, one might be deprived of liberty without actually being confined, or of property without actually being subjected to forcible expropriation.<sup>285</sup> These ideas were “glittering generalities” that permitted the judge to reach a little beyond the constitutional text. Then he added this:

If, for example, a law should be enacted, which prohibited the prosecution of some employment which did not involve the infliction of injury upon others, or which restricts the liberty of the citizen unnecessarily, and in such a manner that it did not violate any specific provision of the constitution, it may be held invalid, because in the one case it interfered with the inalienable right of property, and in the other case it infringed upon the natural right to life and liberty.<sup>286</sup>

While refusing to embrace the rhetoric of social contract, the Gilded Age writers read the words “property” and “liberty” in the Fourteenth Amendment due process clause in expansive ways, reaching prospective legislation of general application. Thus, *Lochner* and similar cases in both state and federal courts could strike down employee-hours regulation or upset occupational licensing statutes without ever mentioning the social contract. These statutes deprived affected persons of both “liberty” and “property” without due process.<sup>287</sup> Even so, Justice Holmes complained in both *Lochner* and *Adkins*, nearly 20 years apart, that the Court’s decisions striking down hours and wages regulation could not be shown to depend on any “specific provisions” in the Constitution itself, but rather relied only the “vague contours” of the Fifth Amendment.<sup>288</sup>

The union of social-contract theory and liberal constitutional statecraft or economic policy is not a part of either the original Constitution or the classical Constitution that emerged several decades later and prevailed

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284. TIEDEMAN, POLICE POWER, *supra* note 124, at 7.

285. *Id.* at 10.

286. *Id.* at 11.

287. *E.g.*, *People v. Ringe*, 197 N.Y. 143, 146 (1910).

288. *Adkins v. Children’s Hosp.*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Holmes referenced the Fifth Amendment because the statute in question was passed by Congress to regulate wages in Washington, D.C. As such it was not controlled by the Fourteenth Amendment, which limited state action.

through the era of economic substantive due process. The ideology of social contract is largely a 20th-century phenomenon, originating in post-New Deal attacks on legislation and rational basis constitutional tests,<sup>289</sup> but later picked up by welfare liberals as well.<sup>290</sup> Its principal 20th-century manifestations are public-choice theory on the right and Rawlsian social justice on the left.<sup>291</sup> The real source of classical liberal doctrine as reflected in the courts, particularly after the Jackson era, was migration of classical economic theory into legal thought. In that, the social contract never played a significant role.

## V. CONCLUSION

Classical constitutionalism was not the doctrine of the founders. It was an extraordinarily important movement, however, that occupied the middle portion of American constitutional history. The nearly half century period from the Constitution's making until the establishment of classical theory under the Taney Court came first. The classical Constitution emerged from the Jacksonian coalition's reaction to state involvement in economic development that critics believed was not justified for viable projects, that harmed the property rights of others, and that so often represented legislative capture for the benefit of the few.

Even this Jacksonian Constitution was not "classical" in the libertarian sense. Accompanying the rise of constitutional *laissez faire* were the great Jacksonian "reform" movements. Strong regulation of morals under essentially Christian principles was transferred away from churches that had been weakened by decades of division to government authority.<sup>292</sup> The misconceived notion that our constitutional thought has ever been dominated by moral libertarians is an equally important fallacy, whose treatment is reserved for another day.

Economic classicism as a dominant constitutional ideology came to a sudden end in the late 1930s, and today the "post-classical" constitutional era is approaching 80 years old. The dominant view today is that the constitutional revolution that upended the classical Constitution was "progressive." When capitalized, that term refers to an important but relatively

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289. *E.g.*, BUCHANAN & TULLOCK, *supra* note 1. For the state of thinking as of the mid-20th century, just before the rise of modern public choice theory, see generally J.W. GOUGH, *THE SOCIAL CONTRACT: A CRITICAL STUDY OF ITS DEVELOPMENT* (2d ed. 1957).

290. *E.g.*, RAWLS, *supra* note 227.

291. For a good history and discussion of the principal works, including the application of social-contract theory to constitutional law, see DENNIS C. MUELLER, *PUBLIC CHOICE* 597-642 (3d ed. 2003).

292. See HOVENKAMP, *supra* note 6, at 243-62. On the Jackson Era as an age of increased public regulation of morals, see ROBERT H. ABZUG, *COSMOS CRUMBLING: AMERICAN REFORM AND THE RELIGIOUS IMAGINATION* (1994); GEORGE M. THOMAS, *REVIVALISM AND CULTURAL CHANGE: CHRISTIANITY, NATION BUILDING, AND THE MARKET IN THE NINETEENTH-CENTURY UNITED STATES* (1989); IAN R. TYRRELL, *SOBERING UP: FROM TEMPERANCE TO PROHIBITION IN ANTEBELLUM AMERICA, 1800-1860* (1979).

short-lived political movement that lasted from around 1900 to around 1920 and actually ended while constitutional classicism was still very much alive. When used with a small “p,” as is more common in legal and constitutional history, it refers to a much broader movement that encompasses Progressivism, the New Deal, the Warren Court, the Great Society, and even the agenda of the Democratic Party and some independents and Republicans today.

For both its defenders and its critics, describing this movement as “progressive” enables them to go back and discover some lost element of constitutional law. In fact, however, most of the changes in economic policy and the constitutional doctrine that displaced constitutional classicism are not “progressive” at all. They are better described as “neoclassical” or “marginalist,” reflecting centrist changes in theories of economics and value embraced by a wide population, including many who would never describe themselves as progressive.<sup>293</sup> That is why we can never go back.

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293. See HOVENKAMP, *supra* note 6, at 1–12.